92-1589

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EXXON SHIPPING COMPANY,
Petitioner,

v.

THEODORE M. ELLENWOOD and ANN M. ELLENWOOD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state handicap discrimination laws should govern maritime employment relationships that are not local in character when such laws differ from state to state thereby disrupting the uniformity of maritime law.

2. Whether section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793(a), preempts state handicap discrimination claims and related state common law contract claims against federal contractors.

3. Whether maritime law recognizes an implied contract of employment based on the terms of an employee policy statement.

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the First Circuit, entered on January 14, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 984 F.2d 1270 and is reproduced in the Appendix at 1-38. The pertinent opinion of the United States District Court for the District of Maine is reported at 6 IER Cases (BNA) 1623 (D. Me. 1991), and is reproduced in the Appendix at 39-48.

JURISDICTION

The decision of the Court of Appeals for which review is sought was entered on January 14, 1993. On January 28, 1993, petitioner Exxon Shipping Company

("Exxon Shipping")[1] filed a petition for a rehearing which the Court of Appeals denied on February 23, 1993. On March 12, 1993, the First Circuit stayed issuance of the mandate until April 2, 1993. This petition for a writ of certiorari is timely pursuant to 28 U.S.C. § 2101(c). The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Rehabilitation Act of 1973, 29 U.S.C. § 793(a), provides, in relevant part:

> Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps as defined in section 706(8) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States.

The Maine Human Rights Act, 5 Me. Rev. St. Ann. § 4571, provides:

> The opportunity for an individual to secure employment without discrimination because of race, color, sex, physical or mental disability, religion, age, ancestry or national origin is recognized as and declared to be a civil right.

The New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-4.1, provides:

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[1] Rule 29.1 Statement: The parent company of petitioner Exxon Shipping Company is Exxon Corporation.

> All of the provisions of the act to which this act is a supplement shall be construed to prohibit any unlawful discrimination against any person because such person is or has been at any time handicapped or any unlawful employment practice against such person, unless the nature and extent of the handicap reasonably precludes the performance of the particular employment.

The Texas Commission on Human Rights Act, Tex Rev. Civ. Stat. Ann. Art. 5221k, § 5.01, provides:

> It is unlawful employment practice for an employer:
>
> (1) to fail or refuse to hire or to discharge an individual or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, disability, religion, sex, national origin, or age; or
>
> (2) to limit, segregate, or classify an employee or applicant for employment in a way that would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee because of race, color, disability, religion, sex, national origin or age.

STATEMENT OF THE CASE

In reversing the district court's ruling, the First Circuit held that maritime courts must enforce claims based on handicap discrimination laws enacted by the various states. The decision, in practical terms, imposes on maritime employers obligations under differing and often inconsistent state handicap discrimination laws even where —as in this case—no single state has a particular interest in the controversy between the maritime employer and the seaman. Under the First Circuit's ruling, the rights of individual crew members on board a ship sailing the high seas will differ widely, potentially depending on such circumstances as the residence of a particular seaman, the ports at which a ship calls, the location of an

employer, or other factors—no matter how *de minimis*—that permit a state to assert jurisdiction over a particular claim.

The Court of Appeals' decision also reversed the district court's ruling that section 503 of the federal Rehabilitation Act of 1973, 29 U.S.C. § 793, preempts claims of handicap discrimination against federal contractors. The First Circuit held that there is no federal interest in uniform standards of conduct for federal contractors and no congressional intent to preempt state law claims, a decision in sharp conflict with the Eleventh Circuit's opinion in *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983).

In addition, the First Circuit recognized an implied employment contract based on a maritime employer's statement of an employee substance abuse policy, undermining the long established maritime principle of employment-at-will.

A. Background

Theodore M. Ellenwood ("Ellenwood") and his wife, Ann M. Ellenwood ("Mrs. Ellenwood"), filed a 14 count complaint arising from Exxon Shipping's reassignment of Ellenwood from a position as chief engineer on a 635-foot ocean-going oil tanker due to his history of substance abuse. A.3 n.1, 39. Ellenwood, a resident of Maine, was employed by Exxon Shipping, a Delaware corporation with headquarters in Texas. Ellenwood sailed on the high seas and in the coastal waters of a number of states along the Atlantic and Gulf coasts. A.42-43 n.5.

In 1989, "[s]hortly after the *Exxon Valdez* struck a reef off the Alaskan coast," Exxon Shipping adopted a revised employee substance abuse policy. A.2. That policy prohibited a person, such as Ellenwood, who had a history of substance abuse, from holding a specifically "designated," safety-sensitive position. The position of

chief engineer on an oil tanker was among those "desinated" as safety-sensitive under Exxon Shipping's revised policy. "Designated" positions were narrowly defined under the Exxon Shipping policy as those which are critical to the safety of the public-at-large, the environment or other employees and, in addition, meet each of the following requirements: (1) have a high exposure to a catastrophic accident; (2) have a key and direct role in the operating process where failure would cause a catastrophic accident; and (3) have no direct or very limited supervision readily available to provide operational checks (the "1989 Policy"). Tr. Vol. II at 106-113; Defendant's Ex. 66 at B00697-700. Under that 1989 Policy, challenged here, Ellenwood was not terminated but was offered reassignment to non-"designated" positions at pay and benefits identical to those earned in his prior position. Joint Ex. 24; Tr. Vol. II at 179.

Ellenwood refused to accept any of the reassignments offered to him by Exxon Shipping and, along with his wife, filed this action. Ellenwood asserted claims based on Maine, New Jersey and Texas handicap discrimination statutes; breach of contract; breach of an implied covenant of good faith and fair dealing; estoppel; wrongful discharge in violation of public policy; misrepresentation; fraud; defamation; intentional and negligent infliction of emotional distress; and three separate counts of invasion of privacy. A.3 n.1. Mrs. Ellenwood asserted claims for intentional and negligent infliction of emotional distress and loss of consortium. *Id.* Jurisdiction of the district court was invoked by Ellenwood pursuant to 28 U.S.C. § 1332. Complaint ¶ 5.[2] In addition, Ellenwood simultaneously filed a separate claim alleging substantially identical facts under section 503 of the Rehabilitation Act with the Department of Labor's Office of Federal

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[2] Following the entry of judgment in the district court, the Court of Appeals granted the State of Maine permission to intervene in this action on the issue of whether federal law preempted Ellenwood's claim based on the Maine Human Rights Act. A.3 n.2.

Contract Compliance Programs ("OFCCP"). In that complaint Ellenwood also asserted that he was unlawfully discriminated against on the basis of his handicap. *See* Exhibit C to Hayes Affidavit in support of defendant's motion for summary judgment. (Dist. Ct. Clerk Doc. No. 46.)

B. The District Court Decision

Three elements of the decision by the district court are relevant here. First, the district court dismissed Ellenwood's state law claims of handicap discrimination, following the ruling of the Court of Appeals for the Eleventh Circuit in *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983), and holding that section 503 of the Rehabilitation Act preempts Ellenwood's claims of handicap discrimination. A.42. Second, the district court held that Ellenwood's handicap discrimination claims were not cognizable under maritime law. A.42 n.3.

Third, the district court permitted Ellenwood's breach of contract and promissory estoppel claims—both based on Exxon Shipping's 1987 employee substance abuse policy—to go to the jury. A.41, 44. The jury returned a verdict in favor of Ellenwood on those claims in an amount of $677,648. A.3.[3]

C. The First Circuit Decision

1. *Maritime Preemption*

The First Circuit held that maritime courts must recognize claims based on state handicap discrimination laws. The First Circuit found irrelevant the assertion by Exxon Shipping (and the finding of the district court) that application of various state handicap discrimination statutes would undermine the "harmony and uniformity"

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[3] In addition, the district court dismissed Ellenwood's claims for punitive damages and held, as a matter of law, that Exxon Shipping was not liable to either Ellenwood or Mrs. Ellenwood for infliction of emotional distress. Each of these rulings was affirmed by the First Circuit. A.26, 29.

of maritime law. A.16. The First Circuit said that "a state law claim should not be dismissed simply because it would result in differing remedies for plaintiffs in different parts of the country." A18. State law claims, the First Circuit said, should be "foreclosed" in maritime cases "only if the state law in question frustrates a fundamental tenet of admiralty law." *Id.*

The Court of Appeals rejected the proposition that the harmony and uniformity of maritime law constitutes such a "fundamental tenet," A.20, noting that "we have been shown nothing in substantive maritime law that is even potentially at odds with state human rights statutes . . ." A.18. The First Circuit held that the absence in maritime law of any prior recognition of a claim for handicap discrimination "is not a reason to dismiss the state claim but a basis upon which to give effect to the state provisions." A.19.

2. *Rehabilitation Act Preemption*

The Court of Appeals, contrary to the holding of the district court, also found that Ellenwood's handicap discrimination claims are not preempted by section 503 of the Rehabilitation Act. A.14. The First Circuit, in finding that Congress had indicated no interest in a uniform system for handling handicap discrimination claims brought against federal contractors, rejected the contrary analysis of section 503 by the Court of Appeals for the Eleventh Circuit in *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983). A.11. The First Circuit discounted the statement in a 1984 Senate Report that indicated section 503 "be administered in such a manner that a consistent, uniform and effective Federal approach to discrimination against handicapped persons would result," A.8, finding that Congress's sole concern was coordination between the Department of Labor and the Department of Health, Education and Welfare. A.8-9. The First Circuit further found that there was no basis to infer a Congressional intent to preempt state law claims

since, the Court of Appeals stated, Ellenwood's handicap discrimination claim "does not threaten the *uniformity* of the § 503 system." A.11. In essence, the First Circuit found that independent state law claims against federal contractors could co-exist with the section 503 administrative scheme even if such co-existence requires federal contractors to face incongruent rules of conduct in the area of handicap discrimination.

3. *Maritime Employment At-Will Doctrine*

Finally, the First Circuit concluded that a maritime employer may bind itself to an employment contract by issuance of an employee substance abuse policy. A.20-21. In a departure from the long-established maritime principle of employment-at-will, the Court of Appeals held that Exxon Shipping entered into an enforceable employment contract when it issued its 1987 employee drug and alcohol policy.

The Court of Appeals found that the maritime employment-at-will doctrine was not implicated in this case because "a maritime employer may make a contractual agreement with, or an enforceable promise to, its employees." A.21. The First Circuit did not analyze whether such an employment contract or promise should be recognized when contained in a statement of employee policies, and it did not mention that no maritime court—until this case—had ever enforced such a contract.

REASONS FOR GRANTING THE WRIT

There are three reasons why the Court should grant Exxon Shipping's request for a writ of certiorari. First, the decision of the Court of Appeals imposes on maritime employers, for the first time, obligations under differing and often inconsistent state handicap discrimination laws. The decision is in conflict with Supreme Court authority on the need for uniformity in maritime law, and will cause substantial confusion in the relationship between maritime employers and seamen. This in turn will result

in disruption to an industry essential to the national interest. The important federal question of whether maritime law effectively preempts state handicap discrimination laws is one which the Court should decide.

Second, the decision of the First Circuit holding that section 503 of the Rehabilitation Act does not preempt Ellenwood's handicap discrimination claims conflicts with the Eleventh Circuit's conclusion in *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983). The Eleventh Circuit has held that Congress intended that federal contractors face uniform standards in meeting obligations to employees with handicaps; the First Circuit found no such intent. The conflict is significant: federal contractors within the First Circuit now face the myriad of state handicap discrimination laws; those in the Eleventh Circuit do not. The Court should resolve this conflict.

Third, the recognition by the First Circuit of a maritime employment contract implied from an employee policy statement raises an important question of federal law. This decision by the Court of Appeals is apparently a ruling of first impression. It too promises to have a broad impact on the maritime industry; the First Circuit decision should be reviewed by the Court.

I. THE DECISION OF THE FIRST CIRCUIT IMPOSING ON MARITIME EMPLOYERS VARYING OBLIGATIONS UNDER STATE HANDICAP DISCRIMINATION LAWS IS OF NATIONAL IMPORTANCE, IS IN CONFLICT WITH SUPREME COURT PRECEDENT, AND SHOULD BE REVIEWED BY THE COURT

Incorporating into maritime law the varying discrimination laws of 50 states undermines the uniformity and harmony which has been an intrinsic tenet of admiralty law since its inception. No precedent from this Court or from any other circuit court supports the holding of the First Circuit that varying state handicap discrimination

laws and regulations must be engrafted into maritime law.

As a matter of public policy, there are two critical maritime interests that require protection: one is protection of the harmony and uniformity of admiralty law; the second is maritime law's traditional interest in the protection of the seaman. Contrary to the decision of the First Circuit, neither of these interests needs to be sacrificed here to further the other. Undermining the harmony of maritime law is unnecessary to meet admiralty's interest in protecting seamen. As Ellenwood has here, each seaman has a federal remedy for discrimination based on handicap under either section 503 of the Rehabilitation Act or, as of last year, the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. The goal of showing special solicitude to the seaman need not be met here at the expense of maritime uniformity.

Additionally, maritime law is well developed in defining the respective rights and obligations of the employer and the seaman. There is not, contrary to the view of the First Circuit, a gap in this area of maritime law that warrants supplementation with inconsistent state statutes.

A. The Incorporation of State Handicap Discrimination Laws Into Maritime Law Will Inject Great Uncertainty into the Law Governing Maritime Employment

The decision of the First Circuit incorporating state handicap discrimination laws into maritime law injects the very uncertainty into admiralty that the Court has consistently eschewed. *See, e.g., Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 676 (1982) (noting that "the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities"). Review by the Court is warranted to determine whether introduction of so disparate a body of law into admiralty is appropriate. Under the decision of

the First Circuit, not only will maritime employers face differing obligations under particular state handicap discrimination laws, the same employer may well face different duties and liabilities toward various crew members on a single ship in the midst of a particular voyage. Such an outcome, in an area of developing rights and duties such as handicap discrimination law, does violence to the intrinsic purpose of maritime law—maintenance of a uniform and consistent code of conduct for an industry whose operations touch a multitude of jurisdictions. This is not to say that a rigid uniformity is always required in maritime law. Neither is it to say that state law may not properly supplement maritime law. But where, as here, the substantive body of state laws is so incongruant, and where, as here, there are no particular local interests which are dominant, there simply is no place for incorporating an array of inconsistent state laws into maritime law.

Not surprisingly, there is substantial, and in some areas, increasing disharmony in the body of state handicap discrimination laws and rules. Substantively, states treat various disabilities differently. For example, states differ as to whether AIDS and its related illnesses are protected handicaps. *Compare Hilton v. Southwestern Bell Tel. Co.*, 936 F.2d 823 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992) (holding that AIDS and AIDS-Related Complex are not protected handicaps under the Texas Commission on Human Rights Act), *with Estate of Behringer v. Medical Center*, 249 N.J. Super. 597, 592 A.2d 1251 (1991) (holding that AIDS is a qualified handicap under the New Jersey Law Against Discrimination). States also differ as to whether an employer can discriminate on the basis of obesity, *compare State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 219-20, 491 N.Y.S.2d 106, 109-110, 480 N.E2d 695, 698-99 (N.Y. 1985) (holding that an employee's obesity was a disability under New York law) *with Civil Serv. Comm'n of City of Pittsburgh v. Pa.* 527 Pa. 315, 317, 591 A.2d 281, 283-84 (Pa. 1991) (rejecting claim that an employee's

obesity constituted a handicap under Pennsylvania law), and as to whether high blood pressure is a physical handicap protected by anti-discrimination laws. *Compare American Nat'l Ins. Co. v. Fair Employment and Hous. Comm'n*, 32 Cal.3d 603, 610, 186 Cal. Rptr. 345, 349-50, 651 P.2d 1151, 1155-56 (Cal. 1982) (recognizing high blood pressure as a physical handicap and forbidding discrimination based on this characteristic) *with Connolly v. Suffolk County Dep't of Civil Serv.*, 150 A.D.2d 373, 374-75, 540 N.Y.S.2d 821, 822 (2d Dep't), *app. denied*, 74 N.Y.2d 611, 546 N.Y.S.2d 555, 545 N.E.2d 869 (1989) (finding that a denial of employment by reason of high blood pressure does not constitute discrimination). Similarly, state laws differ with regard to whether various forms of cancer constitute a protected handicap. *Compare Chrysler Outboard Corp. v. Dep't of Indus., Labor & Human Relations*, 13 Empl. Prac. Dec. (CCH) ¶ 11,526 (Wis. Cir. Ct. 1976) (holding that a person with lymphocytic leukemia is handicapped under Wisconsin law) *with Lyons v. Heritage House Restaurants, Inc.*, 89 Ill.2d 163, 170-71, 432 N.E.2d 270, 274 (Ill. 1982) (holding that a person with cancer of the uterus is not handicapped under Illinois law). If left unreviewed by the Court, the decision of the First Circuit invites, "as a general matter," A.20, each of these inconsistent statutes into the maritime law.

Further complicating the introduction of state handicap discrimination claims into maritime law are the substantial differences in remedies and processes among the various states. For example, some state human rights laws permit the recovery of punitive damages. *See, e.g., State v. Porter Farms*, 382 N.W.2d 543, 55 FEP Cases (BNA) 48, 55 (Minn. App. 1986); *Gallagher v. Wilton Enterprises*, 962 F.2d 120 (1st Cir. 1992) (considering Massachusetts Fair Employment Practices Act). Others do not. *See, e.g., Thoreson v. Penthouse International*, 80 N.Y.2d 490, 519 N.Y.S.2d 978, 606 N.E.2d 1369 (N.Y. 1992). Certain states permit recovery of compensatory damages. *See, e.g., Mountain Clay v. Commonwealth of*

Kentucky, 830 S.W.2d 395 (Ky. App. 1992). Again, others do not. *See, e.g., Harris v. International Paper Co.*, 765 F. Supp. 1509, 1525 (D. Me. 1991).

Similarly, procedural matters including the requirement to exhaust administrative remedies, the employers covered and the applicable statutes of limitations vary dramatically among state human rights laws In Florida, for instance, a complainant must file an administrative charge prior to bringing a civil action under the Florida Human Rights Act. *See Ali v. City of Clearwater*, 807 F. Supp. 701 (M.D. Fla. 1992). In New Jersey, on the other hand, a complainant may elect to file initially in state court. *See Ferrara v. Tappan Co.*, 722 F. Supp. 1204, 1205-06 (D. N.J. 1989). Maryland's Fair Employment Practices Act applies to employers with 15 or more employees. Md. Code Ann. Article 49B § 1 *et seq.* Massachusetts' Fair Employment Practices Act applies to employers with six or more employees, Mass. Gen. L. ch. 151B § 1, while the Michigan Civil Rights Act applies to an employer with a single employee. Mich. Comp. Laws Ann. 37.2101. The statutes of limitations among the state discrimination laws also vary considerably. In New Jersey, the handicap discrimination statute of limitations runs for six years. *See Miller v. Beneficial Management Corp.*, 776 F. Supp. 936, 960 (D. N.J. 1991). In Texas, civil actions under the Commission on Human Rights Act are governed by a 12 month statute of limitations. *See Jumper v. Conagra Int'l*, 58 FEP Cases (BNA) 1581, 1582 (W.D. Tex. 1992).

The inconsistency of state handicap discrimination laws —both as a matter of substance and procedure—is not unexpected. Prohibitions against discrimination based on handicap is an area of developing law. Legislatures, administrative agencies and courts may, and do, differ reasonably over just what constitutes a "handicap" and what is the proper balance of public and private rights in developing a body of law aimed at protecting handicapped individuals from unlawful discrimination. Unlike

other areas of discrimination law, such as discrimination based on race, gender or age where the basis for the discrimination is almost always facially evident, the area of employment discrimination against persons with handicaps often involves a extraordinarily delicate balancing of legitimate, but competing interests. Fundamentally, as in the situation that gave rise to this action, issues of handicap discrimination often implicate a delicate balance of social values and public policy options. In many ways, precisely how those choices are made will differ from state to state and probably from time to time. That is exactly the type of uncertainty that will wreak havoc with the need for consistency in maritime law. It is why the Court should review the decision of the First Circuit which poses a substantial risk to the harmony of maritime law, and a consequential disruption to an industry of national importance.

B. Uniformity and Certainty Are Intrinsic and Fundamental Values of Maritime Law

The First Circuit correctly recognized that state law must be displaced in maritime cases when the state law "materially prejudices 'the characteristic features of maritime law.'" A.17-18, *citing* 1 *Benedict on Admiralty* § 112, at 7-36. But the Court of Appeals then proceeded to disregard the central importance that maritime law places on uniformity, ignoring the fact that uniformity is perhaps the most well-established "characteristic feature of maritime law." *See Southern Pacific Co. v. Jenson*, 244 U.S. 205, 216 (1917); *see also Miles v. Apex Marine Corp.*, 111 S.Ct. 317, 322-23 (1990) (finding "the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country"); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 n.6 (1982) (recognizing "the importance that Congress has attached to having all vessels operating on navigable waters governed by uniform rules and obligations"); *Moragne v.*

States Maritime Lines, Inc., 398 U.S. 375, 402 (1970); 1 Steven F. Friedell, *Benedict on Admiralty* § 105, at 7-12 to 7-13 (7th ed. 1992) (noting that "state legislation . . . is not permitted . . . to impair that uniformity which in international and interstate relations the Constitution designed to establish in conferring the maritime power upon the United States"); 1A Ellen M. Flynn *et al.*, *Benedict on Admiralty* § 2 (7th ed. 1991) (discussing "the doctrine that the maritime law must be uniform throughout the nation and state legislation may not introduce disharmonious elements").

In dicta, the First Circuit said that maritime law could preempt certain handicap discrimination claims where "employment of the handicapped would conflict with the maritime doctrine of seaworthiness." A.19-20. But, of course, one way or another, all decisions involving handicap discrimination may well implicate the seaworthiness doctrine. *See, e.g., Indiana Civil Rights Comm'n v. American Commercial Barge Line Co.*, 523 N.E.2d 241 (Ind. App. 1988), *cert. denied*, 492 U.S. 920 (1989). Certainly, implementation of a maritime employer's substance abuse policies could bear on a vessel's seaworthiness. But the dismissal by the First Circuit of this concern, along with its failure to analyze the substantial disruption enforcement of inconsistent state handicap discrimination rules will cause maritime law, underscores the First Circuit's undervaluation of uniformity as an intrinsic interest of maritime law. The comment by the First Circuit that "[a]ll state laws, if given effect in admiralty cases, will interfere to a degree with the uniformity of admiralty law" is simply off the point. A.17. This is not a case where there is a recognized basis for introducing state law claims into admiralty. No single state interest exists here to nullify admiralty's adherence to consistent standards of conduct.

It is true that state laws have been applied frequently (and properly) in cases—unlike this one—where there is a strong local interest in a particular controversy. This

"maritime but local" rule was first articulated in *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921), where the Court applied a state claim in the absence of a maritime wrongful death claim. The Court in *Garcia* found that the subject in dispute "is maritime and local in character" because it involved a death resulting from "a maritime tort committed on navigable waters *within a state* whose statutes give a right of action on account of death by wrongful act." *Id.* at 242 (emphasis added). The Court then found that application of the state statute:

> "will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."

Id. Where state law has been applied by the Court in such maritime cases, it is because there is a significant local involvement with the case before the Court. *See, e.g., Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

There is no localized state interest present when, as here, a Maine resident (with shipmates from any of 50 states) sailing the high seas and touching the coastal waters of numerous states sues a Delaware corporation headquartered in Texas; dominant here is the federal interest in a uniform set of laws for maritime commerce. *See East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 n.2 (1986); *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961). Review by the Court is warranted to prevent that dominant federal interest from being battered by application of inconsistent state handicap discrimination laws.

C. There Is No Need To Undermine Maritime Law's Uniformity Since Seamen Already Have a Federal Remedy for Handicap Discrimination

Further, the disruption to the uniformity of maritime law caused by the First Circuit's decision cannot be justified by the need to craft a special maritime remedy for Ellenwood. This is not a case where an "employee-sensitive" outcome is required based on what the First Circuit called the "special solicitude for the welfare of seamen and their families." A.20, *quoting Miles*, 111 S. Ct. at 327. Here, Ellenwood already has a federal remedy. In September, 1989, he filed a complaint with the U.S. Department of Labor's Office of Federal Contract Compliance Programs (the "OFCCP"), alleging that Exxon Shipping's conduct toward him violated the Rehabilitation Act. *See* Exhibit C to Hayes Affidavit in support of defendant's motion for summary judgment (Dist. Ct. Clerk Doc. No. 46). In Ellenwood's OFCCP proceeding, which is pending, Ellenwood seeks, among other remedies, lost pay and reinstatement to his position as chief engineer. And, even for those maritime employees who sail without protection under the Rehabilitation Act, they now are protected—in a uniform fashion—by the obligations imposed by Congress nationwide under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213.

Even if the Court of Appeals ruled correctly that seamen should be provided a maritime claim in addition to their federal statutory claims, the Court should determine whether the definition of that claim is found in the statutes enacted by Congress--the Rehabilitation Act and the ADA—rather than in the inconsistent statutes and rules adopted by state legislatures and agencies in the 50 states. It is long-settled that in composing the body of maritime law, courts first look to Congressional enactments and then to decisions of the federal courts—principally the Supreme Court—before turning to state law for guidance. *See* 1A-Pt 2 James W. Moore, *et al.*, *Moore's Federal Practice* § 0.326 at 3233-35 (2nd ed. 1992) (dis-

cussing the hierarchy of sources for the development of maritime law). Here, the Rehabilitation Act and the ADA provide maritime courts with a uniform definition of a claim for employment discrimination on the basis of handicap. Deriving a maritime claim from these laws —based on the uniform substantive law arising from Congressional enactments—would avoid the disruption of the admiralty's interest in uniformity which, unless reviewed, will be the legacy of the First Circuit's decision.

D. There Is No Gap In Maritime Employment Law That Requires Supplementation by State Law Here

Finally, contrary to the finding of the First Circuit, there is no gap in maritime employment law warranting the supplementation of existing law by incorporation of state handicap discrimination laws. The district court properly noted that "maritime law has not addressed handicap discrimination," A.19, an observation that prompted the Court of Appeals to determine that a gap in maritime law needed to be filled. A.19. But the First Circuit's identification of a maritime law gap governing the employment relationship between seamen and employer is misplaced. That law already is highly developed. As the Fifth Circuit put it:

> "Section after section of the United States Code governs and regulates in minute detail the rights and duties of seamen, down to the form of shipping articles to be signed by them and the contents of their daily diet."

Donovan v. Texaco Inc., 720 F.2d 825, 828 (5th Cir. 1983). *See also Southern Steamship Co. v. NLRB*, 316 U.S. 31, 38-39 (1942) (discussing that seamen are beneficiaries of detailed federal protection with Congressional enactments prescribing such things as medicines, clothing, heat, hours and wages). "As the Supreme Court has long recognized, the absence of a federal right of recovery may suggest a strong federal interest, and when a state 'supplements' the federal law by adding a cause

of action it thereby deprives the defendant of a substantive right to be free of an obligation." 1 Steven F. Friedell, *Benedict on Admiralty*, § 112 at 7-37 (7th ed. 1992), *citing Just v. Chambers*, 312 U.S. 383 (1941); *Branch v. Schumann*, 445 F.2d 175 (5th Cir. 1971).

Indeed, prior to the First Circuit's decision, each of the maritime cases that considered the application of state discrimination laws to admiralty law declined to enforce state claims. In *Belanger v. Keydril Co.*, 596 F. Supp. 823, 825-826 (E.D.La. 1984), *aff'd*, 772 F.2d 902 (5th Cir. 1985), the Fifth Circuit refused to recognize a maritime cause of action for discrimination based on age. And, in a maritime case closely on point, the Indiana Court of Appeals in *Indiana Civil Rights Comm'n v. American Commercial Barge Line Co.*, 523 N.E.2d 241 (Ind. App. 1988), *cert. denied*, 492 U.S. 920 (1989), held that maritime law preempted Indiana's handicap discrimination law.

In the area of maritime employment law, there is no gap that warrants incorporation of state handicap discrimination laws. It is appropriate for the Court to review the decision of the First Circuit incorporating state handicap discrimination laws into maritime law.

II. THE DECISION OF THE FIRST CIRCUIT CONFLICTS DIRECTLY WITH THE DECISION OF THE ELEVENTH CIRCUIT IN *HOWARD v. UNIROYAL* WHERE STATE CLAIMS WERE FOUND PREEMPTED BY THE REHABILITATION ACT

The Court should also grant Exxon Shipping's petition for a writ of certiorari to resolve the question of whether section 503 of the Rehabilitation Act preempts state handicap discrimination law claims. The decision of the First Circuit is in sharp conflict with the decision of the Eleventh Circuit in *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983), which found a state contract claim preempted by section 503. In *Howard*, the Eleventh

Circuit recognized in section 503 a Congressional intent "to insure that there would be a uniform, consistent Federal approach to discrimination against handicapped persons by federal contractors." 719 F.2d at 1561. The First Circuit, on the other hand, dismissed *Howard's* finding that Congress intended a uniform and consistent approach to discrimination against handicapped persons by federal contractors. A.8-9. It is on this difference, the Eleventh Circuit's finding of an intent for uniformity and the First Circuit's failure to find such an intent, that the circuit courts reached opposing conclusions on the issue of federal preemption. Where, as the Eleventh Circuit held, uniformity is intended by Congress, federal preemption must follow. Where, as the First Circuit held, such uniformity is not intended by Congress, varying state handicap discrimination claims may be enforced. This is a conflict which the Court should resolve.

The analysis of the Court of Appeals for the Eleventh Circuit in *Howard* follows faithfully the preemption standards set down by the United States Supreme Court in *Pennsylvania v. Nelson*, 350 U.S. 497, 502-09 (1956). *See also Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-18 (1992); *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). First, the *Howard* court found, the regulations promulgated by the Secretary of Labor under section 503 of the Rehabilitation Act are both comprehensive and pervasive and leave "no room" for state law claims of handicap discrimination against federal contractors. *Howard*, 719 F.2d at 1559. The First Circuit considered this irrelevant since it found that compliance with state law and section 503 was not a "physical impossibility," A.10, *quoting Florida Avocado & Lime Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963). *But see Charleston v. W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) ("When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and

a state law is not to be declared a help because it attempts to go further than Congress has seen fit to go" (Holmes, J.)). Second, according to the Eleventh Circuit, the federal interest in regulating federal contractors is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." 719 F.2d at 1560. The First Circuit rejected the Eleventh Circuit's view that there is a "dominant" federal interest in the conduct of federal contractors. A.10-11. Finally, as the *Howard* court held, enforcement of state law claims presents a serious risk of undermining the express Congressional intent "to insure that there would be a uniform, consistent federal approach" to discrimination against handicapped persons by federal contractors. 719 F.2d at 1561. The reasoning of the *Howard* court—adopted by the district court here but rejected by the First Circuit—found that separate state law efforts to regulate conduct which gives rise to claims of discrimination against handicapped persons would "frustrate the uniformity of decision necessary to develop a consistent federal approach." *Id.* at 1562.

It is that federal interest in uniformity which serves as the foundation of the preemption analysis. And it is that foundation upon which the First and Eleventh Circuits split. In the First Circuit, as noted, the only cognizable Congressional interest in uniformity is the avoidance of inconsistencies between federal agencies. A.8-9. The First Circuit thereby sanctions inconsistencies resulting from enforcement of state claims; such inconsistencies are avoided by the Eleventh Circuit's preemption analysis. 719 F.2d at 1562.

In addition to rejecting the Eleventh Circuit's interpretation of Congressional intent, the First Circuit also sought to distinguish the state contract law claims raised in *Howard* from the state statutory claims raised by Ellenwood. A.11. The First Circuit, without analysis, detected a distinction in principles of preemption based on whether the state claims originate in statutory law,

as in the case of handicap discrimination, or common law, as was the case in *Howard*. The First Circuit's holding concludes that courts applying state *statutes* governing a federal contractor's conduct may permissibly undermine federal uniformity even if courts applying the state *common law* of contracts may not. But there is no principle in that distinction: for preemption to mean anything, it must operate on conduct, not legal theory. "[S]tate (and federal) courts generally may not adjudicate claims based on *conduct* that is protected or prohibited by federal labor law, or arguably so." *Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1168 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985), *citing San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959) (emphasis added). That is why the First Circuit's failure to preempt *both* Ellenwood's state handicap discrimination claims and state contract claims should be reviewed by the Court.

The First Circuit's effort to distinguish *Howard* simply underscores the conflict in reasoning and result between the Eleventh Circuit's decision in *Howard* and the First Circuit's decision here. The Court should resolve that conflict.

III. THE FIRST CIRCUIT'S RECOGNITION OF A MARITIME EMPLOYMENT CONTRACT IMPLIED FROM AN EMPLOYEE SUBSTANCE ABUSE POLICY WILL HAVE A BROAD IMPACT ON AN INDUSTRY VITAL TO THE NATIONAL INTEREST

In an apparent ruling of first impression, the First Circuit held that maritime law will recognize an employment contract inferred from a term contained in an Exxon Shipping employee policy statement. This ruling too raises an important issue of federal law having broad impact on the maritime industry. It should be decided by the Court.

In recognizing a contract of employment between Ellenwood and Exxon Shipping, the First Circuit held

that enforcement of a provision in Exxon Shipping's 1987 employee policy statement did not implicate a "new 'wrongful discharge' cause of action on behalf of Ellenwood." A.21. But, in fact, the First Circuit's holding that an employee policy statement can, by itself, override maritime law's employment-at-will doctrine constitutes a major erosion of the at-will doctrine. It is true that over the past generation the common law of certain states has carved out an exception to the employment at will doctrine by recognizing implied employment contracts in certain types of employee policy statements. *See, e.g., Weiner v. McGraw Hill, Inc.*, 57 N.Y.2d 458, 457 N.Y.S. 2d 193, 443 N.E.2d 441 (N.Y. 1982) (holding that oral representations and an employee handbook promising discharge only for just cause created contractual obligation to refrain from termination of employee absent just cause). However, maritime law has never recognized such an implied contract—until the First Circuit decision here. It is a long-established precept of maritime law that absent "a contractual provision specifying a definite term or voyage during which a seaman will be employed, the seaman's employment is 'terminable at will by either party.'" *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057, 1060 (5th Cir. Unit A 1981), *quoting Findley v. Red Top Super Markets, Inc.*, 188 F.2d 834, 837 n.1 (5th Cir.), *cert. denied*, 342 U.S. 870 (1951). Obviously, if an employer may terminate a maritime employee at-will, Exxon Shipping properly could reassign Ellenwood here.

There are sound policy reasons for a largely inflexible rule avoiding the recognition of implied contracts in maritime employment. As already noted, Congress has devised an elaborate and express scheme for regulating the relationship between a seaman and a shipowner. *See supra* at 18. And, until recently, absolutely no cause of action for wrongful discharge existed in maritime law

absent an express contractual agreement.[4] Then, in *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. Unit A 1981), the Fifth Circuit created a single, narrow exception to the at-will rule for maritime employment based on a discharge for filing a claim for personal injury under the Jones Act, 46 U.S.C. § 688, a statute enacted to provide a cause of action to injured seamen. But in recognizing that single, limited maritime cause of action, the Fifth Circuit said that in all other respects, a seaman may be discharged "for good cause, for no cause, or even in most circumstances, for a morally reprehensible cause." *Id.* at 1063. *See also Meaige v. Hartley Marine Corp.*, 925 F.2d 700, 702 (4th Cir.), *cert. denied*, 111 S. Ct. 2826 (1991) ("Under general maritime law, a seaman is an employee-at-will and may be discharged for any or no reason.").

Reviewing the laws of the various states, it is apparent that the prevailing law does not recognize an enforceable contract based on a statement in an employer's policy statement on employee substance abuse.[5] Courts that have confronted this issue typically have held that substance abuse policies distributed to at-will employees do not have the force of an employment contract and do not change an employee's at-will status. *See, e.g., Franklin v. Delta Airlines, Inc.*, 951 F.2d 359 (Table) (text in WESTLAW) (9th Cir. 1991) (rejecting plaintiff's claim that Delta's failure to adhere to the alcohol rehabilitation policy in the company's Standard Practices manual was a violation of an employment contract under Hawaii law); *Horne v. J.W. Gibson Well Service Co.*, 894 F.2d

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[4] Ellenwood did not allege that he had an express contractual agreement based on anything other than Exxon Shipping's policy statements. *See* Complaint ¶¶ 48-51.

[5] In the absence of Congressional enactments, maritime courts look to the amalgam of state common law to fashion uniform admiralty precepts of substantive law. *See* 1A-Pt 2 James W. Moore *et al., Moore's Federal Practice* ¶ 0.326 at 3233-35 (2nd ed. 1992).

1194, 1195-96 (10th Cir. 1990) (holding that employee manual in which employer codified its rules and regulations with respect to drug use did not change at-will status of employee under Wyoming law). *But see Johnson v. Carpenter Technology Corp.*, 723 F. Supp. 180 (D. Conn. 1989) (enforcing under Connecticut law the terms of a substance abuse policy). In today's environment, an employer should be permitted to adopt employee substance abuse policies without fear that the policy—subject to changing circumstances—will become a binding contract of employment. The chilling effect the First Circuit's decision may have on the adoption of such policies is inconsistent with the public interest in maritime employers making good faith efforts to develop responsible policies concerning substance abuse in the workplace.

In sum, the Court should decide whether the First Circuit's erosion of the maritime employment-at-will doctrine is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 1, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1473

THEODORE M. ELLENWOOD, *et al.*,
Plaintiffs, Appellees,

v.

EXXON SHIPPING CO.,
Defendant, Appellant.

STATE OF MAINE,
Intervenor.

No. 92-1474

THEODORE M. ELLENWOOD, *et al.*,
Plaintiffs, Appellants,

v.

EXXON SHIPPING CO.,
Defendant, Appellee.

STATE OF MAINE,
Intervenor.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. D. BROCK HORNBY, *U.S. District Judge*]

Before

BREYER, *Chief Judge*,
COFFIN, *Senior Circuit Judge*,
and CYR, *Circuit Judge*.

Peter Bennett with whom *Daniel W. Bates* was on brief for the Ellenwoods.

Thomas D. Warren, Deputy Attorney General, with whom *Michael E. Carpenter*, Attorney General, was on brief for the State of Maine.

Robert M. Hayes with whom *Charles G. Bakaly, Jr.*, *Richard G. Moon*, and *Linda D. McGill* were on brief for Exxon Shipping Company.

January 14, 1993

COFFIN, *Senior Circuit Judge*. Shortly after the *Exxon Valdez* struck a reef off the Alaskan coast in 1989, defendant Exxon Shipping Company adopted a new policy barring any employee who had ever participated in an alcohol rehabilitation program from holding designated jobs within the company. Pursuant to this policy, plaintiff Theodore Ellenwood, who had no connection to the *Valdez* incident, was removed from his position as chief engineer of another Exxon oil tanker, the *Exxon Wilmington*. Ellenwood voluntarily had entered, and successfully had completed, a month-long alcohol rehabilitation program a year before the *Valdez* accident. Despite his concerns about his drinking, Ellenwood never had had an on-the-job problem with alcohol. A psychiatrist who examined Ellenwood in connection with this case concluded, in fact, that he had never been an alcoholic. *See* Tr. Vol. V, at 133.

Relying primarily on the company's previous written policy that "[n]o employees with alcoholism will have their job security or future opportunities jeopardized due to a request for help or involvement in a rehabilitation effort," Ellenwood and his wife brought suit against Exxon alleging tort and contract claims as well as violations of state statutes prohibiting discrimination against the handicapped.[1] Ellenwood ultimately received a judgment for $677,648 on his contract and promissory estoppel causes of action.

In these appeals, both sides contend, *inter alia*, that the district court committed legal error in defining the actionable counts. Ellenwood claims the judge eliminated too many claims on various legal grounds, depriving him of additional relief, while Exxon claims that the court allowed too many counts to be tried.[2] We affirm most of

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[1] The complaint set forth the following causes of action: breach of contract (Count I); breach of a duty of good faith arising out of Exxon's use of confidential information concerning Ellenwood's alcohol treatment as a basis for removing him (Count II); estoppel arising out of Exxon's representations and promises (Count III); wrongful discharge in violation of the public policy promoting responsible treatment of alcoholism (Count IV); discrimination against the handicapped contrary to various state laws (Count V); misrepresentation over the career consequences of seeking alcohol treatment (Count VI); intentional and negligent infliction of emotional distress on both Ellenwoods in ending Ellenwood's career and disseminating confidential information concerning his condition (Counts VII and VIII); defamation in removing Ellenwood from his position as chief engineer (Count IX); invasion of privacy in the manner in which Exxon obtained the information about Ellenwood's treatment and disclosed it (Count X); invasion of privacy in placing Ellenwood in a false light (Count XI); invasion of privacy in publicizing confidential information (Count XII); Mrs. Ellenwood's loss of consortium (Count XIII); and punitive damages (Count XIV).

[2] This court granted the State of Maine provisional permission to intervene on the issue of whether Ellenwood's claim based on the Maine Human Rights Act, 2A Me. Rev. Stat. Ann. tit. 5, §§ 4571-72 (Supp. 1992), is preempted by federal law.

the court's rulings. We conclude, however, that the district court overestimated the preemptive effects of admiralty law and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796, and, accordingly, we must remand for trial on Ellenwood's state statutory claims of handicap discrimination.[3]

I. *Preemption and the Rehabilitation Act*[4]

A. *Background*

Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, requires any contract with the federal government in excess of $2,500 to include a provision obligating the federal contractor to "take affirmative action to employ and advance in employment qualified individuals with handicaps." 29 U.S.C. § 793(a). Any handicapped individual who believes a contractor has failed to comply with this provision may file a complaint with the Department of Labor, which must conduct an investigation and take appropriate action. 29 U.S.C. § 793(b). Regulations promulgated pursuant to § 503 specify a detailed administrative enforcement mechanism for its breach. *See* 41 C.F.R. §§ 60-741.1-741.32 (1991). The Department's Office of Federal Contract Compliance Programs (OFCCP) is empowered, for example, to seek injunctive relief in court, terminate or cancel a contract, or bar a contractor from receiving future contracts. 41 C.F.R. § 60-741.28(b)-(e) (1991). It also may seek such remedies as back pay and reinstatement for affected employees. *See Dep't of Labor* v. *Texas Indus., Inc.*, 47 Fair Empl. Prac. Cas. (BNA) 18, 28 (Dep't Labor 1988).

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[3] The complaint referred to statutes in Maine, New Jersey and Texas, and we offer no view as to the applicable law. We note, however, that the district court applied Texas law to Count XII of the complaint, which alleged an invasion of privacy. *See* Memorandum of Decision, Oct. 28, 1991.

[4] Our review of the district court's preemption decisions, which were rulings of law, is plenary.

See Howard v. *Uniroyal, Inc.*, 719 F.2d 1552, 1559 (11th Cir. 1983) (detailing enforcement procedures).

In a motion for summary judgment, Exxon, which is a federal contractor, argued that § 503 preempts virtually all of Ellenwood's state law claims,[5] and that Ellenwood's only recourse on matters related to his alcohol treatment is the claim he has filed with the OFCCP. The district court rejected this contention, finding no evidence that Congress intended the provision to eliminate conventional state law claims such as breach of contract, misrepresentation, defamation or infliction of emotional distress, because these claims "are in no way related to the federal Rehabilitation Act, any affirmative action clause in a government contract, or handicap discrimination." *See* Memorandum of Decision, Oct. 15, 1991, at 3. The court also ruled, however, that § 503 did preempt Count V's direct claim of discrimination on the basis of handicap in violation of various state statutes, and Count IV's common law claim that Ellenwood's discharge violated a public policy promoting responsible treatment of alcoholism.

Neither party is satisfied with this Solomonic division of the claims. Accordingly, on appeal, we are asked to consider both Ellenwood's claim that the district court erred in ruling that § 503 preempts Counts IV and V and Exxon's contrary assertion that the district court erred in finding that the federal statute does not preempt the contract and promissory estoppel claims on which Ellenwood received a jury verdict. The State of Maine joins Ellenwood in arguing that § 503 does not preempt a claim of handicap discrimination brought under its Human Rights Act, 2A Me. Rev. Stat. Ann. tit. 5, § 4571-72 (Supp. 1992). We take up each plea for reversal in turn, following a brief review of the well established contours of preemption law.

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[5] According to Exxon, only Counts X and XII of the complaint, charging the company with obtaining and disclosing private information, survived preemption.

B. *Preemption Principles*

The preemption doctrine is rooted in the Supremacy Clause, which invalidates state laws that "interfere with, or are contrary to, the laws of congress." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). *See also Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992). A court's sole task in determining whether a state statute is preempted is to ascertain whether Congress intended the federal law to have such effect. *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280 (1987); *Massachusetts Medical Society* v. *Dukakis*, 815 F.2d 790, 791 (1st Cir. 1987). Although Congress may articulate its intent explicitly, *see, e.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 532 (1977), it does not always do so, and the challenge of preemption law is to identify occurrences of implied preemption. Preemption by implication may take place in different ways.

First, congressional intent to preempt state law may be inferred when the scheme of federal regulation in a particular area is sufficiently pervasive and complex "to make reasonable the inference that Congress 'left no room' for supplementary state regulation," *California Federal Savings & Loan Ass'n*, 479 U.S. at 281 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also Dukakis*, 815 F.2d at 791. Second, in areas where Congress has not entirely displaced state regulation, state law will be deemed preempted to the extent it actually conflicts with federal law. Such a conflict occurs either because " 'compliance with both federal and state regulations is a physical impossibility,' . . . , or because the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *California Federal Savings & Loan Ass'n*, 479 U.S. at 281 (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963) and *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

See also O'Brien v. *Consolidated Rail Corp.*, 972 F.2d 1, 3 (1st Cir. 1992).

These alternative avenues to preemption do not mean that either route is to be chosen lightly. The Supreme Court recently reiterated the longstanding principle that " 'the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [course is] the clear and manifest purpose of Congress.' " *Cipollone*, 112 S. Ct. at 2617 (quoting *Rice*, 331 U.S. at 230). Thus, the presumption is against preemption. *Id.* at 2618.

C. *Applying the Principles*

1. *State handicap discrimination statutes.*

Section 503 contains no express language regarding preemption. Our task, therefore, is to determine whether there are other indicia of Congressional intent to render state discrimination laws ineffectual against federal contractors. Exxon essentially makes a two-pronged argument. First, it cites legislative history suggesting that Congress sought a uniform federal remedy for violations of § 503, which would be frustrated if contractors additionally were subject to varying state laws. Thus, according to Exxon, Congress must have intended to preempt state provisions.

Second, Exxon suggests that the detailed nature of the administrative scheme promulgated under § 503 demonstrates Congress's intent to foreclose other types of remedies against federal contractors. Exxon maintains that, while Congress has not fully occupied the field of handicap discrimination, with respect to federal contractors, it has " 'left no room' for supplementary state regulation," *California Federal Savings & Loan Ass'n*, 479 U.S. at 281.

In our view, what Exxon offers as proof of an intent to preempt falls short of the mark. The legislative history on which the company relies is a single passage in

a Senate Committee Report relating to amendments to the Rehabilitation Act that were enacted a year after the Act itself. The amendments made no change in either sections 503 or 504 of the Act,[6] but the Senate Report commented:

> It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections.

S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6373, 6391.

Exxon claims this passage demonstrates that Congress was seeking an exclusive approach to handicap discrimination by federal contractors, and that, consequently, it must have intended § 503 to displace parallel state laws governing the same conduct. Even without regard for the lesser weight accorded this subsequent history than would be accorded contemporaneous legislative comments, *see Heckler* v. *Turner*, 470 U.S. 184, 209 (1985), we believe Exxon has read far too much into the quoted remarks.

We are persuaded that the passage in no way implicates state law but instead reflects Congress's concern about the lack of coordination *on the federal level* between the two agencies responsible for implementing sections 503 and 504. The Senate Report continues from the portion quoted above to elaborate on the agencies' relationship:

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[6] Section 504, 29 U.S.C. § 794, prohibits discrimination against the handicapped in federally funded programs, the United States Postal Service, and in Executive agencies.

> The Secretary of the Department of Health, Education, and Welfare, because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the section 504 enforcement effort and for establishing a coordinating mechanism with the Secretary of the Department of Labor to ensure a consistent approach to the implementation of sections 503 and 504.

S. Rep. No. 1297, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6373, 6391. In our view, Congress was calling for a more uniform and consistent "*Federal* approach to discrimination against handicapped persons," *id.* (emphasis added); nothing in the passage indicates that it was seeking to eliminate any role for state law. *See D'Amato* v. *Wisconsin Gas Co.*, 760 F.2d 1474, 1482 (7th Cir. 1985) (by insisting on coordination, Congress was directing "that the two responsible agencies were not to work at cross purposes or to duplicate each other's efforts") (citation omitted).

Exxon's second basis for inferring an intent to pre-empt—the comprehensive and detailed regulations promulgated under § 503—is equally unavailing. The fact that Congress has implemented an extensive regulatory scheme in a particular area does not lead necessarily to the conclusion that it intended to displace parallel state remedies. As the Supreme Court stated in *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716-18 (1985):

> To infer pre-emption whenever [a federal agency] deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule . . . would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

See also R.J. Reynolds Tobacco Co. v. *Durham County*, 479 U.S. 130, 149 (1986) (preemption should not be inferred simply because federal agency's regulations are comprehensive). Exxon cites nothing in the state provisions that would make compliance with both state law and the detailed § 503 scheme a "physical impossibility," *Florida Avocado & Lime Growers*, 373 U.S. at 143, and, in the absence of other evidence of preemptive intent, there is no basis for displacing the state law.

In accepting Exxon's argument that Congress intended to preempt state anti-discrimination remedies against federal contractors, the district court relied entirely on the analysis of the Eleventh Circuit in *Howard* v. *Uniroyal, Inc.*, 719 F.2d 1552 (1983). In *Howard*, the plaintiff had alleged a claim under Alabama law as a third party beneficiary of the § 503 affirmative action clause contained in contracts between his employer and the federal government.

The Eleventh Circuit rejected this claim. It held that state contract remedies could not be used to enforce § 503 essentially for the reasons Exxon has offered to us in support of its preemption argument. Emphasizing the Senate Report's reference to federal uniformity and the comprehensiveness of the § 503 administrative scheme, the *Howard* court found it "reasonable to infer that Congress left no room in section 503(b) for state contract actions to supplement it," *id.* at 1559. The court concluded that allowing the plaintiff to broaden enforcement of the affirmative action clause by means of state law could frustrate directly the specific scheme designed by Congress, allowing a private claim through the back door that couldn't come through the front door.

An inference of preemption was further warranted, the court held, because Congress's substantial interest in enforcing the affirmative action clause—determining appropriate terms, conditions and remedies—was "more substantial" than the state's interest in providing a remedy

for third party beneficiaries seeking to enforce the same clause. *Id.* at 1561.

We believe Exxon and the district court have relied unwisely on *Howard*, which differs from this case in a crucial respect. There, the plaintiff sought to use state law to enforce § 503 itself; the court ruled that Congress intended the federal administrative remedy to be the plaintiff's sole means of enforcing the affirmative action clause. Here, however, Ellenwood is seeking to enforce not § 503, but independent obligations created by state anti-discrimination statutes.

The claim in this case does not threaten the *uniformity* of the § 503 system. Rather, the issue here is one of *compatibility*, specifically, whether there is any basis for inferring that Congress believed an independent state remedy could not co-exist with the § 503 system. *Howard* is not helpful in this context. In the employment discrimination field, Congressional enactments "have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). *See also California Federal Savings & Loan*, 479 U.S. at 282-83; *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 468-69 (1982); *Muncy* v. *Norfolk and Western Railway Co.*, 650 F. Supp. 641, 644 (S.D.W. Va. 1986) (ruling that § 503 does not preempt state human rights act). Nothing in § 503, which is focused narrowly on the contractual requirement for an affirmative action clause, provides a basis to infer a departure from that traditional approach.

In addition, several references in § 503's legislative history suggest that, rather than seeking to preempt state law through comprehensive legislation, Congressional leaders recognized that the federal statute was a modest one:

> "We are just beginning to do too little as the dimension of the problem grows in geometric proportion." Congressman Vanik, Congressional Record—

> House 18137 (June 5, 1973); "[W]e have only begun to scratch the surface in meeting the needs of our disabled fellow citizens." Congressman Brademus [sic], Congressional Record—House 30149 (September 18, 1973); "I do not consider [this bill] to be a perfect bill, or in all honesty, even an adequate bill." Senator Randolph, Congressional Record—Senate 34586 (July 18, 1973).[7]

Raytheon Co. v. *Fair Employment and Hous. Comm'n*, 46 Fair Empl. Prac. Cas. (BNA) 1089, 1099 (Cal. Sup. Ct. 1988), *aff'd*, 212 Cal. App. 3d 1242, 261 Cal. Rptr. 197 (2d Dist. 1989).

A year later, in the Rehabilitation Act Amendments of 1974, Congress added a provision requiring state agencies that administer programs funded under the Act to take affirmative action to employ and advance qualified handicapped individuals who are covered under § 503. *See* Senate Report No. 1297, *reprinted in* 1974 U.S.C.C.A.N., at 6391-92. The Senate Committee Report noted that these agencies "are expected to adopt strong affirmative action programs which are *at least* equivalent to those now being developed for Federal agencies." *Id.* at 6392 (emphasis added). These comments, although referring to administering agencies rather than federal contractors, nevertheless suggest that Congress both acknowledged the role played by states in the area of handicap discrimination and assumed that states might choose to provide different—greater—protection than that afforded by the federal government. *See Raytheon*, 46 Fair Empl. Prac. Cas., at 1099.[8]

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[7] Both Congressman Brademas and Senator Randolph were among the managers of the legislation. *See* Conf. Rep. No. 500, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S.C.C.A.N. 2143, 2154.

[8] We acknowledge that this post-enactment legislative history is of less weight than contemporary commentary, but it is nevertheless of some significance. *See, e.g., Heckler*, 470 U.S. at 209; *Cannon* v. *University of Chicago*, 441 U.S. 677, 686-687, n.7 (1979).

Finally, we note that, in the recent Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, which amended the Rehabilitation Act and extended remedies for handicap discrimination against many more private employers, Congress stated explicitly that the legislation did not "limit the remedies, rights, and procedures of any . . . law of any State . . . or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter." 42 U.S.C. § 12201(b). While this provision obviously can have no effect on our view of Congressional intent in 1973, it is a particularly pertinent example of Congress's historical practice of allowing overlapping remedies for employment discrimination.[9]

Exxon attempts to distance this case from the tradition of overlapping remedies in two ways. First, it asserts that Congress has a unique interest in regulating federal contractors and, second, it claims that the area of handicap discrimination requires an extraordinary balancing of competing interests that distinguishes it from other types of employment discrimination, such as those involving race, gender or age. In the handicap discrimination field, Exxon maintains, the possibility of conflicting judgments is much greater because courts in different jurisdictions could reach widely disparate conclusions on such basic questions as what constitutes a "handicap" and which handicapped persons are "qualified" to hold particular positions. Restricting individuals to their § 503 remedy would ensure that a federal contractor doing business in more than one state would face uniform obligations nationwide.

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[9] The absence of a provision disclaiming preemption from the Rehabilitation Act of 1973 does not demonstrate, in the absence of other evidence, an intent to foreclose state remedies. Because of its far more comprehensive reach, the ADA is likely to have appeared more preemptive than the earlier legislation. Congress evidently made the sensible decision to avoid confusion by including an express provision.

We think it unlikely that Congress has a special interest in immunizing federal contractors from obligations otherwise applicable to them under state handicap discrimination statutes. These companies may do only $2,500 in business with the federal government, with the bulk of their enterprise devoted to commerce within a single state. This division gives the state a substantial interest in protecting the employment interests of its handicapped citizens. The developing nature of the issues raised in the field of handicap discrimination strikes us as insufficient justification for excusing these employers from obligations imposed on others who differ only in that the federal government is not one of their customers.

Moreover, Exxon's obligation is not simply to identify reasons why Congress might have departed from its usual practice, but to demonstrate a reasonable basis for inferring that Congress did, in fact, intend to make the federal remedy exclusive in this single area of employment discrimination law. Exxon has offered nothing from which we can discern such an intent.

In sum, we find no "clear and manifest" intent on the part of Congress to preempt state handicap discrimination claims against federal contractors. Indeed, we find no signals of such an intent.[10]

2. *Contract and promissory estoppel.*

In its appeal, Exxon contends that the district court should have extended its § 503 preemption ruling to Ellenwood's contract and promissory estoppel claims as well. Exxon points out that these claims allege that the company breached an agreement or promise not to discriminate on the basis of Ellenwood's "handicap" of alcohol abuse. Again relying solely on the uniformity ra-

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[10] Our preemption analysis applies as well to Ellenwood's claim for wrongful discharge based on public policy. We offer no view, however, as to whether such a claim exists under the applicable state law.

tionale, Exxon argues that all state claims based on the same assertedly discriminatory conduct are foreclosed by § 503.

Our ruling on the statutory claims also is dispositive here. We note, however, one instance in which a contract claim based on statements in a company policy manual may be preempted by § 503. Regulations promulgated under the statute require employers to post notices of their Rehabilitation Act obligations and of employee rights under § 503 in "conspicuous places." *See* 41 C.F.R. § 60-741.4(d). If an employer included such a notice in its policy manual solely to comply with this regulation, a state contract claim based on a breach of the manual provision arguably would be preempted by the federal law. *See Arellano* v. *Amax Coal Co.*, 56 Fair Empl. Prac. Cas. (BNA) 1519, 1524-25 (D. Wy. 1991). Such a claim, though in the guise of a contract claim based on the manual, would seem no different from one directly asserting a breach of § 503. A direct claim under § 503 unquestionably would be preempted for the reasons set out in *Howard*.

Exxon does not contend that the statements at issue here were required by § 503. Indeed, such a contention would be patently unsupportable. Ellenwood's contract and estoppel claims are not premised on a general notice of Exxon's affirmative action obligations toward handicapped individuals, but on a very specific written assurance from the company that it would not disadvantage employees for seeking treatment for alcoholism.

We therefore hold that the district court correctly determined that Ellenwood's contract and estoppel claims were not preempted by § 503.

II. *The Role of Admiralty Law*

Our conclusion that § 503 does not preempt Ellenwood's state statutory and common law claims does not end our inquiry into whether those claims are foreclosed by fed-

eral law. Exxon also contends that, even if § 503 does not preempt them, maritime law does. We consider this contention first as to the state statutes and second as to the contract and estoppel claims.

A. *State handicap discrimination statutes.*

In a brief footnote, the district court observed that, even if it had erred in its judgment about § 503 preemption, the state handicap discrimination claims nevertheless would be foreclosed because maritime law, rather than state law, governs all issues surrounding Ellenwood's employment as a chief engineer on board ship. The court stated that, "I am not aware of any basis under maritime law for such a recovery." Memorandum of Decision, Oct. 15, 1991, at 4 n.3.

The district court underestimated the role state law plays in maritime cases. Supreme Court cases make it clear that courts in admiralty cases may reach beyond maritime precedents and apply state laws "absent a clear conflict with the federal [maritime] law," *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973). *See also Romero* v. *International Terminal Co.*, 358 U.S. 354, 373-75, 378, n.42 (1959); *Just* v. *Chambers*, 312 U.S. 383, 391 (1941); *Lyon* v. *Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988); 1 S. Friedell, *Benedict on Admiralty* § 112, at 7-36 (7th ed. 1991); 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (hereafter *Wright & Miller*) § 3672, at 441-444 (1985).

Exxon contends that this is a case of conflict. It asserts that applying state non-discrimination statutes in an admiralty case will contravene federal maritime law by undermining that "most fundamental and long established characteristic of maritime law: the need for 'harmony and uniformity' of that law." Exxon Brief at 21 (quoting *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 216 (1917)). *See also Miles* v. *Apex Marine Corp.*, 111 S. Ct. 317, 322-23 (1990) (noting " 'the constitutionally

based principle that federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country'' '") (quoting *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 398 (1970) (quoting *The Lottawanna*, 21 Wall. 558, 575 (1875))); *Carey* v. *Bahama Cruise Lines*, 864 F.2d 201, 207 (1st Cir. 1988).

Once again, however, Exxon heralds the need for uniformity without an appreciation for the boundaries of its relevance. All state laws, if given effect in admiralty cases, will interfere to a degree with the uniformity of admiralty law. *See* 1 *Benedict on Admiralty* § 112, at 7-36. But when Congress established a separate admiralty jurisdiction and empowered the judiciary to develop substantive maritime principles for use nationwide, 14 *Wright & Miller* § 3671, it simultaneously assured that state law would continue to play some role in maritime affairs through the "saving to suitors" clause.[11] This provision allows plaintiffs to pursue, in addition to maritime relief, ordinary civil remedies provided by state law, so long as they do not conflict with the national substantive maritime law. *See* 14 Wright & Miller § 3672, at 440-444.

Through the years, the Supreme Court has confirmed that "[t]he State and Federal Governments jointly exert regulatory powers" in maritime matters, *Romero*, 358 U.S. at 374, and it is by now well established that state law is displaced only when it materially prejudices "the

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[11] The Judiciary Act of 1789 granted the federal trial courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," but also reserved to "suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." *See Southern Pacific Co.*, 244 U.S. at 215-216. In its present form, *see* 28 U.S.C. § 1333(1), the clause gives the district courts original jurisdiction, "exclusive of the courts of the States," of: "Any civil case of admiralty or maritime jurisdiction saving to suitors in all cases all other remedies to which they are otherwise entitled."

characteristic features of maritime law," 1 *Benedict on Admiralty* § 112, at 7-36. As we observed in *Carey*, "the Supreme Court . . . no longer construes the Admiralty Clause as requiring 'rigid national uniformity in maritime legislation.'" 864 F.2d at 207 (citation omitted). *See also Lyon* v. *Ranger III*, 858 F.2d at 27; G. Gilmore & C. Black, *The Law of Admiralty*, at 49-50 (2d ed. 1975). In other words, a state law claim should not be dismissed simply because it would result in differing remedies for plaintiffs in different parts of the country; such claim is foreclosed only if the state law in question frustrates a fundamental tenet of admiralty law. *See Steelmet, Inc.* v. *Caribe Towing Corp.*, 779 F.2d 1485, 1488 (11th Cir. 1986).

For example, in *Carey*, 864 F.2d at 207, we held that a Massachusetts rule barring tort recovery when a plaintiff is more than 50 percent negligent could not be applied in a maritime case because "[o]ne of the essential and longstanding features of substantive admiralty law is that contributory negligence can be considered only in mitigation of damages." The rule wholly foreclosing recovery is "'completely incompatible' with modern admiralty practice." *Id.* (quoting *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953)).

Although the rule barring state claims only if they directly conflict with basic maritime principles often requires "a delicate accommodation of federal and state interests," *Carey*, 864 F.2d at 207, we have been shown nothing in substantive maritime law that is even potentially at odds with state human rights statutes such as those underlying Count IV of Ellenwood's complaint. Congress's only legislation in the area of handicapped rights has not been directed at maritime cases and, as discussed *supra*, its legislation did not preempt state remedies. We find no indications that the absence of substantive maritime law governing issues concerning individuals with handicaps reflects a federal interest in protecting maritime employers from such obligations.

See 1 *Benedict on Admiralty* § 112, at 7-37. To the contrary, the Rehabilitation Act's applicability to maritime employers demonstrates federal approval of such obligations.

Thus, the district court's observation that maritime law has not addressed handicap discrimination specifically is not a reason to dismiss the state claim but a basis upon which to give effect to the state provisions. Maritime law historically has appreciated the leading role of state statutes in creating additional bases of recovery. In maritime wrongful death cases, for example, remedies first were provided solely under state law. *See Miles*, 111 S. Ct. at 320-23; *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 397 (1970). When Congress enacted maritime wrongful death legislation in 1920, it provided remedies only where state law did not. *Miles*, 111 S. Ct. at 321; *Moragne*, 398 U.S. at 397-98. State statutes continued to play a primary role for another fifty years, until the Supreme Court created a general maritime cause of action for wrongful death. *See Miles*, 111 S. Ct. at 321-323; *Moragne*, 398 U.S. at 398-402.[12]

In its reply brief, the State of Maine notes a possible concern that strict state standards regarding employment of the handicapped would conflict with the maritime doctrine of seaworthiness. The State emphasizes, however, that under its law, any legitimate physical requirements for crew members under the seaworthiness doctrine would constitute bona fide occupational requirements that would provide a defense to claims brought under the statute. *See* 2A Me. Rev. Stat. Ann. tit. 5, § 4572(1) (Supp. 1992). Of course, whether or not a state's statute specifically included such a defensive pro-

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[12] Even today, plaintiffs may invoke state wrongful death statutes under the saving clause insofar as they involve accidents in territorial waters and do not conflict with the substantive principles developed under the maritime wrongful death doctrine. *See Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 227 (1986).

vision, vessel owners obviously could not be held liable for damages under state anti-discrimination laws when federal maritime principles required the employer to make the contested employment decision. In that narrow way, maritime law would be preemptive.

As a general matter, however, we conclude that state human rights statutes may be applied in maritime cases. Indeed, it would be anomalous for maritime law, which has always shown "a special solicitude for the welfare of seamen and their families," *Miles*, 111 S. Ct. at 327, to reject such an employee-sensitive provision. *See also Smith* v. *Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057, 1063 (5th Cir. Unit A 1981) (noting "the admiralty court's protective attitude towards the seaman"). "'[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy.'" *Miles*, 111 S. Ct. at 327 (quoting *Moragne*, 398 U.S. at 387 (quoting Chief Justice Chase in *The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (CC Md. 1865))). *See also Austin* v. *Unarco Industries, Inc.*, 705 F.2d 1, 6 n.1 (1st Cir. 1983) (state law "is generally referred to only when it affords greater protection to maritime employees than that afforded by admiralty law").

B. *Contract and promissory estoppel.*

Exxon contends that, in allowing the jury to consider Ellenwood's contract and estoppel claims, the district court improperly created an exception to the well-established rule that maritime employment is terminable at will by either party in the absence of a contract setting a specific term. According to Exxon, maritime law has "clung tenaciously" to the at-will principle, and only one narrow exception previously has been carved from it. In *Atlas Off-Shore Boat Serv.*, 653 F.2d at 1062-63, the court permitted a claim for wrongful discharge when a seaman was fired for filing a personal injury claim that he was entitled to file by statute. No additional excep-

tions should be allowed to erode the strength of the at-will doctrine, Exxon argues, since the seaman's rights as an employee already are well protected by federal statute. *See generally, e.g.*, 46 U.S.C. §§ 10302, 10303, 10313, 10502, 10504, 10505, 10506 (prescribing procedures governing meals, hours and wages for seamen).

Exxon misperceives the district court's ruling. The court did not devise a new "wrongful discharge" cause of action on behalf of Ellenwood. It simply recognized the obvious fact that—notwithstanding the general rule that a seaman's employment is at-will—a maritime employer may make a contractual agreement with, or an enforceable promise to, its employees.

In this case, Ellenwood claimed that Exxon had promised that his job security and future opportunities would not be jeopardized if he sought treatment for alcoholism. The jury found that the requirements for establishing a binding obligation were met. We see no reason why maritime law would invalidate this self-imposed obligation.[13]

Accordingly, we affirm the district court's judgment on the breach of contract and estoppel claims. *See infra* Section V.

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[13] Exxon does not argue that the district court improperly instructed the jury on the elements necessary to establish a contract or promissory estoppel claim in these circumstances, and we therefore do not delve into this issue. *See, e.g., Pearson* v. *John Hancock Mutual Life Ins. Co.*, No. 92-1684, slip op. (1st Cir. Nov. 10, 1992) (discussing factors necessary to establish contract based on employee manual).

We do note that, as Exxon recognizes in its reply brief, a contract must be "reasonably certain" to be enforceable. *See Restatement (Second) of Contracts* § 33 (1981). An estoppel claim similarly must be supported by a sufficiently definite promise. *See Santoni* v. *Federal Deposit Ins. Corp.*, 677 F.2d 174, 178-79 (1st Cir. 1982). Exxon does not—and, in our view, cannot reasonably—argue that its policy statement assuring no adverse consequences based on alcoholism treatment is insufficiently definite to support a contract or estoppel claim.

III. *Negligent Infliction of Emotional Distress*

The jury awarded Theodore Ellenwood $50,000 and his wife $25,000 on their claims for negligent infliction of emotional distress. The district court overturned these verdicts on the ground that maritime plaintiffs may not recover for negligently caused emotional damages unless they demonstrate accompanying physical injury or impact.[14] The Ellenwoods presented no evidence of physical harm.

In granting judgment for defendants, the district court noted that the Supreme Court in *Atchison, Topeka and Santa Fe Ry. Co.* v. *Buell*, 480 U.S. 557, 568 (1987), had raised the possibility of recovery for purely emotional injury in cases such as this one.[15] The court recognized, however, that our circuit has had no opportunity since *Buell* to consider the issue. *See Moody* v. *Maine Cent. Ry. Co.*, 823 F.2d 693, 694 (1st Cir. 1987) (declining to consider physical injury requirement because plaintiff failed to show causation). It therefore relied on our decision in *Bullard* v. *Central Vermont Ry.*, 565 F.2d 193, 197 (1st Cir. 1977), to hold that a physical injury is a prerequisite for recovery of emotional distress damages.[16]

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[14] The court very prudently allowed the claims to go to the jury, thus foreclosing the possibility of a later heavy investment of time and expense in the event that it should render a judgment notwithstanding the verdict and that we would disagree.

[15] *Buell* involved a claim brought under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60, which creates a negligence cause of action for railroad workers against their employers. The Jones Act, 46 U.S.C. App. § 688, creates the same cause of action for seamen, and incorporates by reference the FELA. Case-law developed under both statutes guides subsequent interpretation of either of them. *See Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 547 (1960); *Gaston* v. *Flowers Transp.*, 866 F.2d 816, 817 (5th Cir. 1989).

[16] Recovery for wholly emotional injuries was not at issue in *Bullard* because the plaintiff also had injured his foot. *See* 565 F.2d at 197 & n.3.

In the aftermath of *Buell*, recovery for wholly emotional injury under the Jones Act and FELA has become an "important and recurring issue" of federal law. *Ray* v. *Consolidated Rail Corp.*, 112 S. Ct. 914 (1992) (White, J., dissenting from denial of certiorari).[17] The circuits vary in their treatment of such claims. *See, e.g., Ray* v. *Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir. 1991) (no recovery under FELA unless injury results from physical contact or threat of physical contact); *Taylor* v. *Burlington Northern R.R. Co.*, 787 F.2d 1309, 1313 (9th Cir. 1986) (claims for wholly mental injury are cognizable); *Holliday* v. *Consolidated Rail Corp.*, 914 F.2d 421, 426-27 (3d Cir. 1990) (rejecting specific claim, but suggesting that, under the right circumstances, emotional distress damages may be recoverable); *Gaston* v. *Flowers Transp.*, 866 F.2d 816, 821 (5th Cir. 1989) (same).[18]

On appeal, plaintiffs urge us to hold explicitly that a seaman may recover emotional distress damages without showing a physical injury. Resolving this issue requires not only careful analysis of the specific facts of the case at hand, but also a review of common law jurisprudence and policy considerations. *Buell*, 480 U.S. at 568-70. As the Supreme Court noted in *Buell*, state court decisions reveal a number of "doctrinal divergences" concerning intentional and negligent infliction of emotional distress.

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[17] *Ray* was, in fact, an FELA case, but, as noted earlier, *see supra* note 15, FELA jurisprudence applies to Jones Act cases.

[18] In *Plaisance* v. *Texaco, Inc.*, 937 F.2d 1004, 1009 (5th Cir. 1991), a divided panel of the Fifth Circuit announced a broad rule permitting recovery for negligently caused emotional injury, but denied recovery in the instant case because the accident was so unexceptional that the significant emotional injury sustained by a tugboat captain was not reasonably foreseeable. Subsequently, in an *en banc* ruling, the circuit affirmed the denial of recovery but withdrew the broad ruling of law. 966 F.2d 166 (1992). The Supreme Court denied certiorari. *See* 61 U.S.L.W. 3400 (U.S. Nov. 30, 1992).

Id. at 569-70. The Court therefore theorized that recovery for emotional injury "might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity." *Id.* at 568. It concluded its discussion by cautioning that, in this area of law, "broad pronouncements . . . may have to bow to the precise application of developing legal principles to the particular facts at hand." *Id.* at 570.

Because the Ellenwoods have failed to present their claims of negligence with particularity, this is not an appropriate case in which to undertake such a substantial inquiry. Counts VII and VIII of the complaint, in the words of the district court, alleged "intentional and negligent infliction of emotional distress on both Mr. and Mrs. Ellenwood in ending Ellenwood's career and disseminating confidential information concerning his conditon." Memorandum of Decision, Oct. 15, 1991, at 2. Neither the complaint nor the Ellenwoods' briefs, however, specifically identifies the negligent acts of commission or omission.[19] In closing argument, plaintiffs' counsel referred in one sentence, in conclusory terms, to the negligent infliction claim.[20]

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[19] For example, was the alleged breach of contract the asserted negligent action? Or was it the manner in which the new policy was devised? or communicated? or applied? Was the disclosure of Ted Ellenwood's alcohol treatment negligent? If so, how? Instead of specifically identifying the allegedly unreasonable conduct that constituted a breach of duty, plaintiffs apparently assumed that we could, and would, discern from the underlying facts one or more bases for their negligence claims. This approach dates back to plaintiffs' complaint, where they simply incorporated by reference the factual background underlying the other causes of action to support the negligence claims. *See* Complaint at ¶¶ 88-90.

[20] Following lengthy discussions of the contract, promissory estoppel and intentional infliction of emotional distress claims, counsel stated:

> I suggest to you that even if you don't find outrageousness [an element of the intentional infliction tort], you should still

The lack of attention devoted to this claim is further illustrated by plaintiffs' assertion that Ted Ellenwood's negligence cause of action was brought under general maritime law, not the Jones Act. *See, e.g.*, Tr. Vol. XII, at 7. In fact, the Jones Act provides the exclusive recovery in negligence for claims by seamen against their employers. *See Miles* v. *Apex Marine*, 111 S. Ct. 317, 324 (1990) (Jones Act was a response to *The Osceola*, 189 U.S. 158 (1903), which established that seamen could recover under general maritime law for injuries resulting from unseaworthiness but not negligence); *Beltia* v. *Sidney Torres Marine Transport, Inc.*, 701 F.2d 491, 493 (5th Cir. 1983) (Jones Act is "the sole basis upon which a seaman or his beneficiaries may sue his employer for negligence") (citation omitted). Ellenwood's general maritime cause of action could be dismissed for that reason alone.[21]

The Supreme Court in *Buell* only speculated that some claims for purely emotional injury may be brought under the FELA. *See Moody*, 823 F.2d at 694 (door to recovery

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return a verdict of negligent infliction of mental distress. I feel, however, very strongly that intentional infliction of emotional distress has been shown because of this policy itself and the actions Exxon Shipping Company took against him deliberately after this policy came into effect.

Tr. Vol. XI, at 98.

The court's instructions on the negligence count also were framed broadly. The court told the jury that the plaintiff must prove that (1) Exxon acted or failed to act as "a reasonably prudent corporation would act in the management of its affairs;" (2) that "severe emotional distress" to plaintiffs was foreseeable; and (3) that plaintiffs suffered such distress as a result of negligence. *See* Tr. Vol. XI, at 47.

[21] Although Mrs. Ellenwood's claim arises under general maritime law, the limitations on recovery contained in the Jones Act nonetheless are relevant because her claim is based on assertedly negligent conduct governed by the statute. *See generally Miles* v. *Apex Marine*, 111 S. Ct. at 327 ("We sail in occupied waters. Maritime tort law is now dominated by federal statute . . . .").

only "somewhat ajar"). Conducting the particularized review needed to evaluate such a claim here would require a detailed examination of Exxon's assertedly negligent conduct, its context, and its impact on the Ellenwoods. Arguably, even in a routine case, it would be inappropriate for us to construct a theory of negligence so that we could analyze a claim of apparently little importance to the plaintiffs. *A fortiori*, we would be ill-advised to do so here, where we are asked to take a precedential step with a highly circumscribed license from the Supreme Court.[22]

We decline to explore the frontiers of the negligent infliction tort in these circumstances. Accordingly, the district court's judgment vacating the Ellenwoods' damage awards is affirmed.[23]

IV. *Punitive Damages*

The Ellenwoods contend that the district court erred in refusing to submit their punitive damages claim to the jury. This argument faces a threshold barrier because the Ellenwoods have prevailed so far only on contractual

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[22] We note that the viability of emotional distress claims based on management policy decisions and other day-to-day interactions between employees and employers is a particularly sensitive matter. *See, e.g., Holliday* v. *Consolidated Rail Corp.*, 914 F.2d 421, 425, 427 (3d Cir. 1990); *Lancaster* v. *Norfolk and Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985); *Puthe* v. *Exxon Shipping Co.*, No. 89-CV-1619, 1992 U.S. Dist. LEXIS 14950, at *33-34 (E.D.N.Y. Sept. 26, 1992). Additionally, we question whether a case such as this, whose dominant claim is that the defendant intentionally reneged on a promise, presents the sort of tortious conduct properly compensable under the Jones Act.

[23] We find no merit in plaintiffs' assertions of error concerning their claims for intentional infliction of emotional distress. The instructions accurately reflected prevailing law, *see Restatement (Second) of Torts* § 46 cmt. d, and the court's evidentiary decisions fell well within its broad discretion, *see Harrison* v. *Sears, Roebuck and Co.*, No. 92-1055, slip op. at 6-7 (1st Cir. Dec. 9, 1992) (expert testimony); *Elgabri* v. *Lekas*, 964 F.2d 1255, 1261 (1st Cir. 1992) (Rule 403).

claims, which ordinarily do not support an award of punitive damages. *See Restatement (Second) of Contracts* § 355 (1981)[24]; *Thyssen, Inc.* v. *S.S. Fortune Star*, 777 F.2d 57, 62-63 (2d Cir. 1985). *See generally Molzof* v. *United States*, 112 S. Ct. 711, 715 (1992) (noting common law understanding that punitive damages were awarded "to punish defendants for *torts* committed with fraud, actual malice, violence, or oppression") (emphasis added).

Despite the general principle, the Ellenwoods contend that an award of punitive damages is permissible here because their claim involved breach of a non-contractual legal duty not to discriminate on the basis of a perceived handicap and, consequently, contractual limitations on damages are inapplicable. *See* Reply Brief at 22. They seek support from our decision upholding punitive damages for a shipowner's willful and callous withholding of a seaman's maintenance and cure in *Robinson* v. *Pocahontas, Inc.*, 477 F.2d 1048, 1051-52 (1st Cir. 1973). There, we emphasized the Supreme Court's statement in *Vaughan* v. *Atkinson*, 369 U.S. 527, 532 (1962), that "[m]aintenance and cure differs from rights normally classified as contractual" because "the duty to provide maintenance and cure 'is imposed by the law itself as one annexed to the employment.'" *Robinson*, 477 F.2d at 1052 (citation in *Vaughan* omitted).

This argument assumes that the Ellenwoods proved more than a breach of contract. They have not. In *Robinson*, punitive damages were permissible because the "'[t]he duty to provide maintenance and cure is in no real sense contractual, and a suit for failure to provide maintenance or cure can hardly be equated, therefore, with an action for breach of contract,'" 477 F.2d at 1052

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[24] This provision states:

> Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

n.3 (quoting *Vaughan*, 369 U.S. at 534 (Stewart, J., dissenting)). Ellenwood's proven breach of contract and promissory estoppel claims did not arise from a duty "imposed by the law itself," *Robinson*, 477 F.2d at 1052, but from Exxon's self-imposed obligation not to jeopardize the job security or future opportunities of employees who sought treatment for alcoholism. The Ellenwoods have cited no maritime decision awarding punitive damages for breach of this type of contractual obligation. *See Thyssen, Inc.*, 777 F.2d at 62 (no case found in which admiralty court awarded punitive damages for breach of contract).

We are aware of a recent trend to permit punitive damages in the contract setting in a narrow range of circumstances. *See* 5 A. Corbin, *Corbin on Contracts* § 1077 (1964 and Supp. 1992). This practice has been deemed appropriate when the breaching party acted with "[t]he state of mind which accompanies an intentional tort." *Id.* (Supp.) at 179. In this case, the jury found against the Ellenwoods on their intentional tort claims. Plaintiffs, however, maintain that this finding should not foreclose punitive damages because they claim that the standard for punitive damages under maritime law is less demanding than the standard for intentional infliction of emotional distress. *See Restatement (Second) of Torts* § 46; *Muratore* v. *M/S Scotia Prince*, 845 F.2d 347, 354 (1st Cir. 1988) (maritime standard). And so, plaintiffs contend that the rejection of their intentional tort claims is not fatal to an award of punitive damages.

Assuming that maritime law would permit a limited role for punitive damages in the contract setting—an issue we do not reach—we think it inconceivable that such damages would be available when the jury specifically has rejected plaintiffs' accompanying intentional tort claims. Thus, even if punitve damages may be awarded under martime *tort* law based on conduct that

would not satisfy the standard for intentional infliction of emotional distress, we decline to hold that they may be awarded for breach of *contract* in these circumstances.

Whether punitive damages may be available should Ellenwood prevail upon remand on the handicap discrimination claims is an issue not before us today. At the moment this is solely a contract case, and we adhere to the settled rule of law prohibiting such an award.

V. *Burden of Proof*

Exxon attempted to prove at trial that, even if Ellenwood had not been removed from his chief engineer's post in April 1989, he would have lost his job later in the year when Exxon downsized its fleet. Consequently, because Exxon continued to pay Ellenwood's full salary and benefits through January 1991, the company argued that Ellenwood was not entitled to any damages for breach of contract or promise.

On appeal, Exxon claims that the district court incorrectly instructed the jury that the company bore the burden of proving that Ellenwood would have been terminated for *bona fide* reasons unrelated to the new alcohol rehabilitation policy. The burden should have been placed on the plaintiff, Exxon asserts, and this error entitles the company, at a minimum, to a new trial on the contract and estoppel claims.

We find it unnecessary to consider this issue on the merits because we conclude that Exxon failed to preserve it. At two separate times, once before the jury charge and once after it, the court and counsel discussed the instruction on this defense. On the first occasion, during the precharge conference, the court announced its decision to impose the burden on the defendant to prove that Ellenwood would have lost his job for independent reasons, and twice repeated its intention to give such an instruction. *See* Tr. Vol. XI, at 24, 28, 29.

At that time, Exxon responded by asking the court to include, within the "independent reasons" portion of the jury charge, a sentence about "business judgment." This addition would have emphasized to the jury that, in considering whether Ellenwood would have been terminated as a result of the fleet's downsizing, it was not permitted to second-guess Exxon's business judgment in devising and applying its ranking system. *See* Tr. Vol. XI, at 26. The ensuing discussion focused on how to communicate to the jury that its task was limited to determining whether the ranking system was a pretext. The instruction ultimately adopted by the court included language suggested by Exxon's counsel. *Id.* at 29. At no time during this discussion did counsel object to the court's imposing the burden on Exxon.

Subsequently, the district court instructed the jury that "Exxon Shipping has the burden of proof to show you that Mr. Ellenwood would have lost his job for independent, nonpretextual reasons," *see* Tr. Vol. XI, at 51. Following the full charge on all claims, the district court held a sidebar conference in which it heard and responded to both sides' objections. At that time, Exxon's counsel requested an "additional instruction" on damages for breach of contract or promise.

The proposed addition consumes 43 lines in the trial transcript. *See* Tr. Vol. XI, at 64-66.[25] The first four paragraphs contained essentially the instruction on business judgment that Exxon had requested earlier. *See* Tr. Vol. XI, at 65 ("You may not consider whether in your opinion the evaluations or the rankings are appropriate or were done in a manner you agree with."). The next section opens with the assertion that "[t]he sole question you are to consider is whether Exxon Shipping maintained its employee ranking list in good faith," *id.*, and then states that, in deciding the question, "plaintiffs have the burden of proof." *Id.* The proposal goes on to elab-

[25] The requested instruction is reproduced in its entirety in an appendix to this opinion.

orate on the plaintiff's burden, i.e., to show "by a prepondenace of the evidence that Exxon Shipping manipulated or otherwise misused its ranking procedure in bad faith to cause Mr. Ellenwood to be ranked lower on the ranking list of chief engineers than he otherwise would have been." *Id.* at 65-66.

The district court gave the following response to Exxon's proposal:

> So far as the requested lengthy instruction . . . by the defendant involving rank, proximate cause, good faith, management practices and so on, I am satisfied that would involve me in too great a commentary on the evidence. Instead, I've given a general charge concerning the issue of whether Exxon would otherwise have terminated him, required only that its reasons be independent and not pretextual. I believe that that adequately meets the standards in this area.

Tr. Vol. XI, at 72. It appears that the district court focused primarily, if not exclusively, on the first portion of Exxon's lengthy request and concluded that its own pretext instruction adequately met Exxon's concern that the jury not consider how good the ranking system was but only whether it was used in good faith. Exxon made no further response and did not inform the court that it also was concerned about who had the burden on this issue.

What Exxon did here was not enough to entitle it to assert this issue on appeal as a basis for a new trial. Counsel did not object to the court's burden instruction, but proposed only an addition. The proposal was long and, in its latter portion, contradicted the court's earlier instruction on burden. When the court reacted with comments apparently directed only to the first part of the proposal, counsel made no effort to highlight its concern regarding the burden. This omission is particularly sig-

nificant in light of the earlier discussion, which focused solely on the busness judgment rule.

Similarly, in its post-trial memorandum seeking a new trial on the contract and estoppel claims, under the heading "Employee Rankings," Exxon argued only that the court erred "in declining to instruct the jury that it could not second guess the business judgment of Exxon Shipping with respect to its performance evaluations and employee ranking system." *See* Memorandum, at 9. Again, no reference was made to the burden of proof.

Not until its reply brief on appeal did Exxon articulate clearly and concisely its burden of proof objection. It is well established, the company now contends, that the burden of proving bad faith must be on the party seeking to show it because "[d]isproving bad faith is almost always close to impossible." Reply Brief, at 17. Because the issue here was not the quality of Exxon's ranking system, but whether the system was maintained in good faith, the company claims the burden should have been on Ellenwood to prove that Exxon manipulated its rankings in bad faith.

We do not reach this argument because it is too late. To consider disassembling the court and jury's substantial work without clearer notice than Exxon gave to the district court would be to snub the requirement in Fed. R. Civ. P. 51 that a party must "stat[e] distinctly the matter objected to and the grounds of objection." Accordingly, we leave undisturbed the district court's judgment on the contract and estoppel claims.

VI. *Benefits Offset*

Exxon has claimed error in the district court's instruction to the jury not to offset the damages award by the amount of special retirement benefits the company has paid or will pay to Ellenwood. Under a "special sea service plan," Exxon contributed to an annuity that distributed monthly payments to retired employees

in amounts based on life expectancy. Ellenwood began receiving annuity payments of nearly $20,000 a year following his retirement in 1991 at age 45. It is these payments that Exxon seeks to have offset.

Exxon's argument is based on the general principle that an award of lost earnings makes the wrongfully discharged employee whole and that to add pension benefits would give the employee a windfall. Ellenwood counters with his own windfall argument: subtracting the expected benefits from the damages award treats the employer who breaches an employment contract more charitably than one who has observed one faithfully. Both parties cite caselaw to support their claims.

In fact, however, we conclude that the record made in this case, rather than general principles, dictates the result. The relevant facts are contained in a letter from an Exxon official in response to a request from Ellenwood's counsel to provide "[t]he 1990 percentages of payroll for the various benefits provided to employees." Brief of Plaintiffs-Appellees at Addendum 18. The letter, which is not mentioned in Exxon's brief, itemized the percentages of payroll attributable to life insurance, medical and dental insurance, Medicare, a thrift plan, long term disability insurance, workers' compensation, and "all other." These items totalled 20.8% But included in the listing, indeed heading the list, was "Annuity" and its percentage, "(2.7%)". In other words, this percentage was deducted from the total of the above listed items, making the bottom line total percentage for fringe benefits 18.1%.

The effect of this listing was to indicate to Ellenwood's economic expert on damages that he should add to his computation of lost earnings 18.1% of those earnings to reflect compensation in the form of fringe benefits. Exxon did not add into the benefits total the 2.7% annuity item, which would amount to an annual payment of approximately $2,300. Indeed, the letter subtracted

the 2.7% from the remaining total of benefits, thereby reducing by a substantial amount the present discounted value of Ellenwood's fringe benefits.

Had there been no breach of the employment contract, the $2,300 yearly contribution apparently would have bought an annuity that, upon Ellenwood's retirement at age 65, would have yielded annual payments in an amount much larger than the present $20,000 amount. We look upon this amount as having been bought by prior Exxon contributions and earned by Ellenwood as part of Exxon's compensation package. To allow Exxon a further deduction for the income stream purchased by the annual $2,300 payment would seem to be, as Ellenwood argues, to allow a double credit.

This, at least, is how we read the testimony of plaintiff's economist, Dr. McCausland, who had asked for the percentages applicable to fringe benefits. He testified that

> the fringe benefit [sic] had to be put into present value terms . . ., it's how many dollars do we have to give him today so he'll have that amount of money available to him in each year to pay for the same fringe benefits.
>
> And I based it on their fringe benefit package . . . . And what I did, I took 18.1 percent of the present value of lost earnings, and that works out to be $294,528.79.

Tr. Vol. V, at 111. On cross examination Exxon's counsel asked, "Now you were also aware that Mr. Ellenwood is receiving almost $20,000 a year in pension benefits currently from Exxon Shipping Company?" To this, Ellenwood's counsel objected, saying, "that's his money, and it is not properly considered to be mitigation." Whereupon Exxon's counsel withdrew the question. *Id.* at 121-122.

On this record the district court ruled that it was "the burden of proof of the defendant to come forward and

show that these are benefits being received that should be subtracted from the amounts that plaintiff would otherwise . . . receive" and that "the state of the record doesn't permit that determination." Tr. Vol. XI, at 35. We agree. Indeed, it seems to us that the record is not merely insufficient to support a basis for offset, but points affirmatively to an already accomplished deduction.

VII. *Conclusion*

The following is a brief summary of our major holdings:

(1) we reverse the district court's ruling that state statutes prohibiting discrimination against the handicapped are preempted by the Rehabilitation Act of 1973 and maritime law, as well as its ruling that plaintiff's claim of violation of state public policy is similarly preempted, and the case therefore is remanded for further proceedings on such claims;

(2) we affirm the district court's ruling that Ellenwood's state contract and promissory estoppel claims are not preempted by either the Rehabilitation Act or maritime law;

(3) we decline to address the Ellenwoods' claim that the district court improperly granted Exxon's request for judgment as a matter of law on their claims for negligent infliction of emotional distress, concluding that these claims were not adequately developed;

(4) we affirm the district court's refusal to submit the issue of punitive damages to the jury;

(5) we find that Exxon failed to preserve its challenge to the district court's instruction imposing upon it the burden of demonstrating that Ellenwood would have been removed from his chief engineer's position in late 1989 for *bona fide* reasons independent of his participation in an alcohol rehabilitation program;

(6) and we affirm the district court's decision to exclude from the jury's damages calculation Ellenwood's sea service retirement benefits.[26]

The judgment of the district court is therefore affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. No costs.

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[26] We have reviewed the district court's rulings on Ellenwood's privacy claims, and find no error.

APPENDIX

The following is the full text of Exxon's proposed additional instruction on damages for breach of contract or promise, as discussed *supra* at page 36.

> As you know, Mr. Ellenwood ceased receiving a salary from Exxon Shipping on January 15, 1991. If you find as Exxon Shipping claims that Mr. Ellenwood would have been terminated prior to that time in the fall of 1989 because of his low performance ranking compared to other chief engineers when Exxon Shipping's oceangoing fleet was downsized, then no damages should be awarded even if you find that Exxon Shipping breached a contract with Mr. Ellenwood.
>
> Under such circumstances, the conduct of Exxon Shipping complained of here was not the proximate cause of any loss Mr. Ellenwood suffered. If on the other hand you find that Mr. Ellenwood would not have been terminated when the fleet was downsized, you may continue to consider damages.
>
> During this case a number of witnesses have testified regarding Exxon Shipping's performance evaluation and ranking system. This case is not about whether you agree with or like Exxon Shipping's performance evaluation or ranking procedures, or whether you agree with or like Exxon Shipping's employment practices. As I previously instructed you, you may not substitute your judgment for the company's.
>
> I therefore instruct you that your views concerning whether Exxon Shipping's ranking system was well administered cannot be considered by you in rendering your decision in this case. You may not consider whether in your opinion the evaluations or the rankings are appropriate or were done in a manner you agree with.

The sole question you are to consider is whether Exxon Shipping maintained its employee ranking list in good faith. In deciding the question, plaintiffs have the burden of proof. By that I mean you must decide whether the plaintiffs have proven by a preponderance of the evidence that Exxon Shipping manipulated or otherwise misused its ranking procedure in bad faith to cause Mr. Ellenwood to be ranked lower on the ranking list of chief engineers than he otherwise would have been.

In essence, did Exxon Shipping make its evaluations of Mr. Ellenwood in bad faith with an intent to injure him in order to improve Exxon Shipping's defense in this case.

If you conclude that plaintiffs have not proven by a preponderance of the evidence that Exxon Shipping acted in bad faith in establishing its ranking list in 1989, then you must find that Mr. Ellenwood has suffered no damages under either of his contract claims.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 90-0086 P-C

THEODORE M. ELLENWOOD, *et al.*,
Plaintiffs

v.

EXXON SHIPPING COMPANY,
Defendant

MEMORANDUM OF DECISION

[Filed Oct. 15, 1991]

In April 1989 the defendant Exxon Shipping Company advised its employee Theodore Ellenwood that he was being removed from his position as Chief Engineer of the Exxon Wilmington, a 635-foot ocean-going oil tanker, because of an upcoming change in its employee drug and alcohol policy. On September 1, 1989, Exxon officially adopted the new policy, prohibiting persons with a history of substance abuse from holding what Exxon Shipping considers certain high risk positions. Exxon's earlier policy had assured employees that they would not be terminated or otherwise disciplined for seeking treatment for substance abuse, and under the earlier policy Ellenwood had sought alcohol abuse treatment and had notified Exxon accordingly. Ellenwood and his wife have now brought this lawsuit challenging Exxon's decision to remove him and Exxon has moved for summary judgment.

Ellenwood's complaint sets forth the following causes of action: breach of a contract based on Exxon's various

policies and letters (Count I); breach of a duty of good faith arising out of Exxon's use of confidential information concerning his alcohol treatment as a basis for removing him (Count II); estoppel arising out of Exxon's representations and promises (Count III); wrongful discharge in violation of the public policy promoting responsible treatment of alcoholism (Count IV); discrimination against the handicapped contrary to various state laws (Count V); misrepresentation over the career consequences of seeking alcohol treatment (Count VI); intentional and negligent infliction of emotional distress on both Mr. and Mrs. Ellenwood in ending Ellenwood's career and disseminating confidential information concerning his condition (Counts VII and VIII); defamation in removing Ellenwood from his position as chief engineer (Count IX); invasion of privacy in the manner in which Exxon obtained the information about Ellenwood's treatment and disclosed it (Count X); invasion of privacy in placing Ellenwood in a false light (Count XI); invasion of privacy in publicizing confidential information (Count XII); Mrs. Ellenwood's loss of consortium because of Exxon's conduct (Count XIII); and punitive damages (Count XIV).

1. *Preemption by Rehabilitation Act*

Exxon maintains that except for Counts X and XII charging it with obtaining and disclosing private information, Ellenwood's complaint based on state law is preempted by a federal statute prohibiting handicap discrimination, The Rehabilitation Act of 1973, 29 U.S.C. § 701-96. That statute, addressed in part to federal contractors such as Exxon,[1] has as its primary enforcement mechanism the

[1] The focus of the Rehabilitation Act is to end discrimination against qualified individuals with handicaps. Thus, section 503 requires that every contract between a contractor like Exxon and a federal agency that exceeds a certain dollar amount must "contain a provision requiring that, in employing persons to carry out such

Department of Labor's Office of Federal Contract Compliance Programs. *See* 41 C.F.R. § 60-741 *et seq.* (1991). Exxon argues, therefore, that any relief relating to handicap discrimination must come through that mechanism. In *Howard v. Uniroyal, Inc.*, 719 F.2d 1552, 1562 (11th Cir. 1983), the Eleventh Circuit Court of Appeals found federal preemption, holding that § 503 preempts a qualified handicapped individual's state claim as a third-party beneficiary under an affirmative action clause entered into between his employer and the federal government.[2]

Unlike *Howard*, however, Ellenwood is not seeking relief under a federal contract or an affirmative action clause that Exxon entered into with the federal government. Except for Counts IV and V, Ellenwood is not even seeking relief under the state law protecting the handicapped. Instead, he is asserting conventional state law claims such as breach of contract, misrepresentation, defamation, infliction of emotional distress, etc. These claims are in no way related to the federal Rehabilitation Act, any affirmative action clause in a government contract, or handicap discrimination. I find no basis to conclude that, in enacting the Rehabilitation Act of 1973, Congress intended to eliminate ordinary state common law causes of action such as these. Under Exxon's reading, even if Exxon and Ellenwood had entered into a separate written agreement that Exxon would do nothing to Ellenwood on account of his alcohol treatment, Ellenwood would be unable to bring a lawsuit to enforce that contract because of the Rehabilitation Act. That is clear nonsense.

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contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps. . . ." 29 U.S.C. § 793(a).

[2] In *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1483-84 (7th Cir. 1985), the Seventh Circuit Court of Appeals held that, as a matter of federal law, an employee has no third-party beneficiary action under an affirmative action clause contained in a government contract.

Count V, on the other hand, is a direct claim of discriminaton on the basis of handicap under state law. Regulations enacted pursuant to § 503 of the Rehabilitation Act provide detailed and extensive procedures for dealing with handicap discrimination when it is practiced by federal government contractors. In *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983), the Eleventh Circuit has set out in great detail the reasons why Congress' actions in this area amount to preemption of state remedies. I see no need to repeat the reasoning of the Eleventh Circuit here. Instead, finding it persuasive, I conclude that the state law count for handicap discrimination, Count V, is preempted by federal law.[3] Count IV seeks state common law relief for Ellenwood's discharge because it violates a public policy promoting responsible treatment of alcoholism. I conclude that any such public policy, if indeed such a policy has been recognized, is included within legislation prohibiting discrimination against the handicapped. Accordingly, it, too, is preempted by the federal statute.[4]

2. *Choice of Law*

Insofar as the plaintiff's causes of action involve his contract of hire, the applicable law is maritime law, not state law.[5] *Kossick v. United Fruit Co.*, 365 U.S. 731,

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[3] If this conclusion is unfounded, I would find for the reasons stated in text in Section 2, "Choice of Law," that maritime law should govern rather than state law. I am not aware of any basis under maritime law for a such a recovery.

[4] If it were not, once again the applicable law would be maritime rather than state law for the reasons set forth in Section 2 and I am not aware of any such policy in maritime law.

[5] Although the plaintiff argues in passing that, even if admiralty principles apply, the court should defer to local policy, it is apparent that this is the type of case that cries out for uniformity. Here, for example, a ship's engineer lives in Yarmouth, Maine, is employed by a company operating out of Texas and New Jersey, and when he is on his ship plies the coastal waters of the United States,

735 (1961) ("Without doubt a contract for hire either of a ship or of the sailors and officers to man her is within admiralty jurisdiction."); *cf. Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057, 1063 (5th Cir. Unit A Aug. 1981); *Bunn v. Global Marine, Inc.*, 428 F.2d 40, 44 (5th Cir. 1970). The employment relationship here, as alleged in the complaint, involved Ellenwood's employment as a chief engineer on board ship. On this basis the following Counts are governed by maritime law:[6] Count I (breach of contract); Count II (breach of duty of good faith); Count III (estoppel); Count VI (misrepresentation); Counts VII and VIII (intentional and negligent infliction of emotional distress in discharging him); Count IX (defamation resutling from the discharge); Count X (invasion of privacy based upon Exxon's policies on alcohol treatment that allegedly induced Ellenwood to disclose confidential information to Exxon and Exxon subsequently violating its guarantee as to how it would use the information); Count XI (the false light charge assertedly arising out of the discharge). Count XIV requests punitive damages and depends upon the vitality of one or more of the other Counts. The remaining Counts are not maritime-related: specifically, Count XII (invasion of privacy based upon publication of confidential information) and Count XIII (loss of consortium of Ellenwood's wife).

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thus touching the jurisdiction of many states. Under these circumstances it is difficult to perceive how any single state has a peculiar interest in the contractual relationship. These are the kinds of considerations that led the Court in *Kossick v. United Fruit Co.*, 365 U.S. at 741-42, to conclude that local law should not apply but that a uniform maritime law should govern.

[6] The saving to suitors clause, 28 U.S.C. § 1333(1), does not help the plaintiff. It is solely a jurisdictional provision and does not give the plaintiff the right to determine whether his liability should be measured by common law instead of maritime law. *See Chelentis v. Luckenbach S.S. Co., Inc.*, 247 U.S. 372, 384 (1918).

3. *Breach of Contract and Estoppel*

With respect to Ellenwood's contract claim, I find that a genuine issue of material fact exists. Although Exxon has pointed to Ellenwood's deposition testimony that he had not been told that his employment was other than on an at-will basis and that he had no written employment contract, Ellenwood's affidavit states that Exxon provided him a written policy stating that job security and future opportunities would not be jeopardized for an employee who sought treatment for alcoholism. Moreover, to the extent that Ellenwood's claim depends upon oral representations, the general rule is that oral contracts are recognized by maritime law. *Kossick v. United Fruit Co.*, 365 U.S. at 734. I cannot, on this record, conclude that there was no contract for more than at-will employment or that the other claims related to Ellenwood's employment relationship with Exxon are foreclosed.[7] For the same reason, Count III, estoppel, survives. Moreover, Exxon has not satisfied me that no cause of action exists under maritime law for breach of a duty of good faith. Count II, therefore, also survives. I will want to see attention to this issue in the trial briefs.

4. *Fraud*

In Count VI Ellenwood claims that Exxon misrepresented to him in its earlier policy the consequences of engaging in alcohol treatment and disclosing the treatment to the company. Now that discovery has been completed, however, it appears that the only proof Ellenwood has of misrepresentation is the fact that in 1989, after the public clamor concerning safety on board ships arising out of the Valdez spill, Exxon abandoned its 1987 policy.

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[7] *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. Unit A Aug. 1981), and *Meaige v. Hartley Marine Corp.*, 925 F.2d 700 (4th Cir. 1991), *cert. denied*, 111 S. Ct. 2826 (1991), do not help Exxon because in neither case was there proof of the kinds of company statements the plaintiff is offering here.

I conclude that no juror could reasonably draw from that proof the inference that the policy promulgated 17 months earlier was accordingly frauduent at the time it was promulgated.[8] Even under Maine law, which the plaintiff prefers, misrepresentation requires the following elements to be proved:

> [A] defendant is liable for fraud or deceit if he (1) makes a false representation (2) of material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to his damage.

Jourdain v. Dineen, 527 A.2d 1304, 1307 (Me. 1987), *quoting Letellier v. Small*, 400 A.2d 371, 376 (Me. 1979). Clearly, on this proof, a jury could not find that Exxon knowingly or recklessly made a false statement of material fact.

5. *Negligent and Intentional Infliction of Emotional Distress, Counts VII and VIII*

Contrary to the argument of Exxon, Dr. Evans' statement that the company is well-meaning and well-intended is not controlling on whether in fact the company acted in good faith in removing Ellenwood. It is not even clear that Dr. Evans' opinions concerning the motivations of Exxon are admissible. Exxon also contends that Ellenwood injured himself by initiating conversations with other crew members about his alcohol treatment. Who provoked the need to initiate those conversations,

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[8] The plaintiff also argues that Exxon's alleged disregard of the confidentiality aspects of its program is further evidence of its fraudulent intent. Even assuming that Exxon disregarded the confidentiality policy in 1988, I find that that sheds no light on the question whether Exxon had fraudulent intent when it adopted its original alcoholism policy.

however, is a question for the jury. Ellenwood asserts that he initiated those conversations only after other personnel had already been made aware of his treatment by Exxon. I conclude that there are jury issues on the question of whether Exxon's conduct was extreme and outrageous, whether it acted intentionally, recklessly or negligently, and whether Exxon's conduct injured the Ellenwoods.

Finally, at trial, the parties will need to be prepared to address whether maritime law recognizes such a cause of action as negligent or intentional infliction of emotional distress. Exxon argues at one point in its brief that these counts are governed by maritime law but it then does not apply maritime law any further than to conclude that Ellenwood has no claim for breach of contract. The rest of its attention is focused on the merits of Texas substantive law. Ellenwood, on the other hand, argues that Maine law applies. Consequently, the trial briefs will need to address this question under principles of maritime law.

6. *Defamation in Count IX and False Light in Count XI*

According to the complaint the sole basis of the plaintiff's defamation claim is the fact of his termination, demotion or reassignment depending upon what it is called. Ellenwood argues that that action by Exxon inherently communicated a defamatory statement about his capacities. I conclude, however, that, whatever jurisdiction's law is applied, a statement, oral or written, must be made. *Restatement (Second) of Torts* § 558 (1977) ("To create liability for defamation there must be: (a) a false and defamatory *statement* concerning another . . ." (emphasis added). On the plaintiff's reasoning, every unjustified demotion, termination or reassignment would inherently be defamatory. That is a perversion of the distinctions between wrongful discharge and defamation. Accordingly, the defendant's

motion for summary judgment on Count IX is *GRANTED*. I reach the same conclusion with respect to Ellenwood's asserted cause of action for invasion of privacy by placing him in a false light under Count XI. The only false light he asserts is Exxon's reassignment of him to a different position. As with defamation, I conclude that the mere act of an employer reassigning an employee does not alone create a cause of action.

7. *Privacy/Intrusion*

In Count X Ellenwood argues that Exxon invaded his privacy by setting up circumstances under which his wife would call the Company and notify it of his alcohol treatment and then later publicizing the information. Ellenwood attempts to distinguish this claim—a privacy action for intrusion—from Count XII where he claims a cause of action for improper publication of confidential information. I conclude that Exxon is entitled to summary judgment on Count X. There was no invasion of privacy in Mrs. Ellenwood's voluntary call to Exxon and no intrusion by Exxon in her choosing to make such a call. Whether the subsequent disclosure of the information was improper is a matter to be considered under Count XII. Pending further research, ruling is reserved on whether Count XII survives.

8. *Consortium and Punitive Damages*

Exxon's motion for summary judgment on these two Counts, XIII and XIV, is *DENIED*. Its argument for summary judgment on the consortium claim is that all other causes of action have disappeared. Since they have not, the consortium claim remains. The vitality of the punitive damages count will also have to await the outcome of the verdict on those counts that remain and I therefore do not grant summary judgment at this time.

9. *Conclusion*

Accordingly, Exxon's motion for summary judgment is *GRANTED* as to Counts IV, V, VI, IX, X and XI, and *DENIED* as to Counts I, II, III, VII, VIII, XIII and XIV. Ruling is reserved on Count XII.

Dated at Portland, Maine this 15th day of October, 1991.

/s/ D. Brock Hornby
D. BROCK HORNBY
United States District Judge